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Editor-in-Chief's Page

It gives me an immense pleasure to release Volume I of our online journal *Delhi Journal of Contemporary Law* 2018. The Journal is peer reviewed with annual periodicity. It is in addition to our print journal *National Capital Law Journal*, which was started way back in 1996. The online journal is focused on contemporary issues of law. It consists of articles, short write ups, case comments and opinions. The Journal gives a platform to academicians, researchers, judges, advocates, students and others to express their original ideas with respect to contemporary issues. This Journal has contributions made by academicians, advocates, researchers and others from all parts of the country. The contributions in this issue cover *inter alia* admissibility of electronic records, protection of traditional cultural expressions, hung legislative assemblies, rohingyas issues, constitutionality of marital rape, institutionalization of arbitration, interface between copyright and human rights, cyber technology, mediation, right to privacy, national green tribunal, triple talaq, disability law, NOTA, late-term abortions of child rape victims and comments on various contemporary issues. I sincerely hope that the issue will come to the expectations of its readers.

Dr. V.K. Ahuja
Editor-in-Chief

Editor's Note

Delhi Journal of Contemporary Law 2018 is the brainchild of our In-charge Dr. V.K. Ahuja. In the field of law, as in life, the only constant is change. It is imperative for lawyers, legal academicians, researchers and law students to stay abreast of the latest developments. As the name indicates, the journal is dedicated to exclusively reviewing contemporary developments in the field of law. The Supreme Court has rendered several landmark pronouncements lately which will have great impact on the legal system. It has been our endeavor to include articles on majority of the areas covered by such decisions. Law Centre-II has started this online journal from 2018. This is in addition to National Capital Law Journal, which is the flagship journal of Law Centre-II since 1996.

I am thankful to Dr. V.K. Ahuja for entrusting me with the responsibility of editing the first volume of this journal and my editorial team for whole heartedly assisting me in this onerous task. My thanks are also due to our contributors without whose scholarly writings this work could not be accomplished. With great pride, I present to you the maiden edition of *Delhi Journal of Contemporary Law*.

Happy Reading!

Dr. Vageshwari Deswal

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DELHI JOURNAL OF CONTEMPORARY LAW

NOTES, COMMENTS AND OPINIONS

EROSION OF HIERARCHICAL DISCIPLINE IN THE SUPREME COURT OF INDIA

*Yogesh Pratap Singh**

I. INTRODUCTION

In a democratic political set up, no one can deny the importance of the judiciary. An independent judiciary is an indispensable requisite of a free society governed by rule of law. Such independence implies freedom from interference by the executive and legislature with the exercise of the judicial function but does not mean that the judges are entitled to act in an arbitrary manner. For a Parliamentary democracy committed by its Constitution to justice for all, Lord Bryce has aptly remarked, "*there is no better test of the excellence of a government than the efficiency of its judicial system*."[1]

The judge's functions are, "to decide individual cases independently, and to act as a custodian of the law. Impartiality must be assured to fulfill the first function, particularly when judges are required to make value judgments, such as reasonableness, fairness and justice. In exercising judgment, the judge must apply values ultimately derived from those prevailing in the community. This is not just the application of public opinion. The judicial function as custodian of the law is essential to the maintenance of parliamentary democracy and the rule of law."[2] As a political concept the 'rule of law' has as at least one main strand, the minimization if not the exclusion of human arbitrariness from the process of law and government.[3] This provided a sound justification to doctrine of *stare decisis* in the common law system. "The doctrine of *stare decisis*, in addition to whatever it may enjoin upon the intellect, certainly evokes an atmosphere and a mood to abide by ancient decisions, to follow the old ways, and conform to existing precedents. It suggests a condition of rest, even of stasis, a system of law whose content is more or less settled, the past content by past decisions, and the present and future content because they too are controlled by those past decisions."[4] The assumed emergence of new decisions from those of the past would depend only on correct judicial reasoning and not on judicial choice and will. And the notion of *stare decisis* would thus run into the notion of 'the rule of law', as in Bracton's famous subjection of the King not to man but to God and the law. "If we could wholly accept the idea that present and future decisions are determinable and determined on the basis of *stare decisis* then indeed we would finally have attained the dream of being under a government of laws and not of men."[5] The principle of *stare decisis* is thus one way by which the courts respect

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[1] Rajkumar Singh, "Judiciary of Independent India : Expectations Ahead",5 *International Journal of Advancements in Research & Technology*, 5(Feb,2016) *available at*: http://www.ijoart.org/docs/Judiciary-of-Independent-India-Expectations-Ahead.pdf(last visited on December 10, 2018).

[2] *Guy Green, "The Rationale and Some Aspects of Judicial Independence", 59 Aus. L. Jour. 135* (1985), *available at:* http://www.uow.edu.au/law/LIRC/CourtResources/courtandjudiciary.html (last visited on December 10, 2018).

[3] Julius Stone, "The Ratio of the Ratio Decidendi", 22(6) *Mod. L. Rev.* 598 (Nov, 1959).

[4] *Ibid.*

[5] *Id.* at 599.

the legitimate expectations of the community.[6] Under Article 141 of the Constitution of India, the law declared by the Supreme Court is made binding on all Courts of India. The Courts should treat a decision of the Supreme Court as an authority not only for what it declares or decides by express enunciation but also for what follows from such declarations by clear implication by way of logical deduction. Besides, principles of judicial discipline and propriety demands that the Judges whatever their own views, must follow the decision of the superior Courts to which they are judicially subordinate. This paper tries to examine some of the disconcerting trends arising in the apex court, which go against the judicial propriety.

II. SMALLER BENCHES DECIDING CONSTITUTIONAL QUESTIONS

The practice of constituting smaller bench is so prolific that in spite of clear constitutional mandate that questions involving substantial question of law as to interpretation of Constitution will be heard and decided by a bench of not less than five judges, several smaller benches (three-judge/two-judge benches) have interpreted and substantially changed the provisions of the Constitution.[7]

A division bench of Supreme Court in *State of Andhra Pradesh* v. *Balram*[8] reflected on the issues of reservation to socially and educationally backward classes under Article 15(4) and upheld the identification made by Andhra Pradesh Government on the basis of caste. A bench of three judges in famous *Bandhua Mukti Morcha* v. *Union of India*[9]case discussed themeaning of *"letter addressed by a party on behalf of persons belonging to socially and economically weaker sections complaining violation of their rights under various social welfare legislations*" and whether it can be treated as a writ petition under the purview of *"appropriate proceedings."*[10] In this process the bench brought a significant change to the law of standing under Article 32. Another two-judge bench[11]in notable *Mohini Jain v. State of Karnataka,*[12] discussed several issues which involved a substantial question of law as to interpretation of constitution.[13] The bench made a significant contribution and expanded the scope of the Article 21 by including the right to education within its ambit.

A three-judge bench of the Supreme Court in *Smt. Selvi* v. *State of Karnataka;*[14] discussed several questions of law as to interpretation of the Constitution,[15] and held "*narco-*

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[6] Jack Knight & Lee Epstein, "The Norms of Stare Decisis", 40(4) *Amer. Jour. of Pol. Science* 1021 (Nov, 1996).

[7]Yogesh Pratap Singh, *Judicial Dissent and Indian Supreme Court: Enriching Constitutional Discourse* 458 (Thomson Reuters, 2018).

[8]*State of Andhra Pradesh* v. *Balram*, AIR 1972 SC 1375. (Vaidyalingam and Mathew, JJ.)

[9]*Bandhua Mukti Morcha*v. *Union of India* (1984) 3 SCC 161.

[10] Article 32(1): The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

[11]Justice Kuldip Singh and Justice R. M. Sahai.

[12]*Mohini Jain* v. *State of Karnataka* (1992) 3 SCC 666.

[13] Four important questions were decided by the bench, "first, was there a `right to education' guaranteed to the people of India under the Constitution? If so, did the concept of `capitation fee' infracts the same? Second; whether the charging of capitation fee in consideration of admissions to educational institutions was arbitrary, unfair, unjust and as such violated Article 14 of the Constitution? Third; whether the impugned notification permitted the Private Medical Colleges to charge capitation fee in the guise of regulating fees under the Act? And fourth; whether the notification is violative of the provisions of the Karnataka Educational Institutions (Prohibition of Capitation Fee) Act, 1984?" See, *Mohini Jain* v. *State of Karnataka* (1992) 3 SCC 666.

[14] *Smt. Selvi* v. *State of Karnataka*(2010) 7 SCC 263.

[15] The issues involved in the case were: "(i) Whether the involuntary administration of the impugned techniques violates the `right against self-incrimination' enumerated in Article 20(3) of the Constitution? (ii) Whether the investigative use of the impugned techniques creates a likelihood of incrimination for the subject? (iii) Whether the results derived from the impugned techniques amount to `testimonial compulsion' thereby attracting the bar

analysis test" violative of right against self-incrimination embodied in Article 20(3) of the Constitution. It is striking to mention here that to clarify some of concerns of similar nature an eleven-judge bench had been constituted in the past.[16]

A two judge bench[17] of the Supreme Court in *U. P. Power Corporation Ltd.* v. *Rajesh Kumar*[18] held that "the state must demonstrate backwardness, inadequacy of representation and maintenance of efficiency before providing reservation in promotions", a question which was discussed by a constitutional bench[19] in *M. Nagraj* v. *Union of India*[20] but what U.P Power Corporation did for the first time was to strike down reservation in promotions for not meeting these criteria.[21] Perhaps this was in violation of clear constitution mandate i.e. "*a substantial question of law which involves interpretation of the constitution will be decided only by constitutional bench*."[22] A two-judge bench[23] while interpreting the law making power of the Parliament on members of legislature convicted of offences, invalidated Section 8(4) of the Representation of Peoples Act,1951.[24] Likewise, prescribing National Policy for disposing of all public resources by public auctioning in 2G Spectrum case,[25] laying down the law for disposing of clemency petitions by the President in capital punishment cases[26] and decriminalizing homosexuality under Indian Penal Code[27]were done by division bench in spite of fact that all these involved substantial question of law as to interpretation of the Constitution.

This paper is not arguing that these cases were decided without jurisdiction (*though in the strict sense of terms this is so*) and hence null and void, but this is certainly against the spirit of the Constitution. Taking Constitution for granted even by the Supreme Court will not craft a good precedent. The only point this paper wants to put forth is that a larger bench would promote better objectivity and lucidity while declaring authoritatively what the law is. This in long run will reduce the likelihood of filing appeal. Larger benches would also ensure better accountability amongst the judges because opportunity of dissent which acts as an intra-organ control will be more in comparison to two-judge benches. This in turn will enhance the status of the Supreme Court as constitutional court and improve its respect in the eyes of the people and the courts below in hierarchy.[28]

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of Article 20(3)? (iv) Whether the involuntary administration of the impugned techniques is a reasonable restriction on `personal liberty' as understood in the context of Article 21 of the Constitution?"

[16]*State of Bombay* v. *Kathi Kalu Ogha*, [1962] 3 SCR 10.

[17]Justice Dalveer Bhandari and Justice Deepak Mishra.

[18]*U. P. Power Corporation Ltd.* v. *Rajesh Kumar* (Decided on 27th April, 2012.)

[19] Y. K. Sabharwal, K. G. Balakrishnan, S.H.Kapadia, C.K.Thakker, P Balasubramanyan JJ.

[20]*M. Nagraj* v. *Union of India*, AIR 2007 SC 71.

[21] *Available at*: http://www.thehindu.com/opinion/lead/winning-the-case-for-promotion-quotas/article3863068.ece (last visited on Dec. 10, 2018).

[22] Art. 145(3), Constitution of India, 1950. It requires that minimum number of judges to discuss a substantial question of law as to the interpretation of this constitution shall be five. The use of phrase 'shall' makes it evidently clear that the provision is mandatory.

[23]*Rajbala* v. *State of Haryana*, Writ Petition (Civil) No. 671/2015.

[24] Experts have raised doubts whether this verdict would stand the test of law as a Constitution Bench of the Supreme Court, on January 11, 2005, in the *K. Prabhakaran* v. *P. Jayarajan case* had stated that: "The persons falling in the two groups [those who are convicted before the poll and those convicted while being MP/MLA or MLC] are well defined and determinable groups and, therefore, form two definite classes. Such classification cannot be said to be unreasonable as it is based on a well laid down differentia and has nexus with a public purpose sought to be achieved."

[25] *Centre for Public Interest Litigation* v. *Union of India* (2012)3 SCC 1.

[26]*Shatrughan Chauhan v. Union of India* (2014)3 SCC 1.

[27] *Suresh Kumar Kaushal* v. *Naz Foundation*, Civil Appeal 10972 2013.

[28]*Supra* n. 7 at 459.

III. DILUTION OF HIERARCHICAL DISCIPLINE

Another drift in the Supreme Court decision making process is the dilution of hierarchical discipline which requires a bench of two judges to follow the judgment of three judges or larger bench and so on. There is no provision in the Constitution which says that a smaller Bench of the Supreme Court is bound by its larger Bench decisions. But judicial propriety and the need for certainty in the law require that a smaller Bench follow the law declared by larger Benches.

The law relating to judicial propriety is fairly settled. It provides that a bench of the Supreme Court must follow a decision delivered by a bench of a larger or even equal strength. In case of inability to agree, the only option available is to refer the matter to the Chief Justice of India requesting to constitute a bench of much larger strength for resolving of conflict. The principles were summed up in the following terms by the then Chief Justice of India, Justice R.C. Lahoti while delivering the decision in a Constitutional Bench judgment in the case of *Central Board of Dawoodi Bohra Community* v. *State of Maharashtra:*[29]

> (1) "The law laid down by a larger Bench of this Court is binding on any subsequent Bench of lesser or co-equal strength.
> (2) A Bench of lesser quorum cannot doubt the correctness of the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."[30]
>
> This rule is subject to two exceptions:
>
> (i) "The aforesaid rule does not bind the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and
> (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration, then by way of exception (and not as a rule) and for reasons, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing."[31]

A three-Judge Bench of this court in *Official Liquidator* v. *Dayanand and Others*[32] reiterated the clear position of law that by virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *State of Karnataka and Others* v. *Umadevi and Others*[33] is binding on all courts including this court, till the same is overruled by a larger

[29]AIR 2005 SC 752.
[30]Faizan Mustafa & Yogesh Pratap Singh, "Key Questions in Disagreement Between SC-3 Judges Benches" *Indian Express*, March 6, 2018.
[31]*Union of India* v. *Raghubir Singh* (1989) 2 SCC 754; *Union of India* v. *Hansoli Devi* (2002) 7 SCC 273.
[32](2008) 10 SCC 1.
[33](2006) 4 SCC 1.

Bench. It observed, "We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed."[34]

The five-judge bench in *Islamic Academy Education* v. *State of Karnataka*[35] did find incongruities and doubts in the eleven-judge bench *Pai case*[36] and found that the process of interpretation occasioned rewriting of some portions of the judgment. It was soon realized that even this constitutional bench could not resolve all the issues raised in *TMA Pai case* and therefore the frequency of litigation increased due to non-clarity of these issues and inconsistencies in it. In view of this, a new seven-judge bench was constituted in *P. A. Inamdar* v. *State of Maharashtra*[37] which not only interpreted the *Pai* judgement but also modified it. Similarly, five-judge bench of *Rameshwar Prasad* v. *Union of India*,[38] while accepting the ratio laid down by the nine-judge bench in *S R Bommai*[39] choose not to follow it by not reviving the unconstitutionally dissolved legislative assembly.

The recent NJAC judgment,[40] which struck down National Judicial Appointment Commission Act too highlights this trend. The genesis of collegium system was laid down by a nine-judge bench in *second judges transfer case*[41] and it was further modified by another nine-judge bench.[42] However, the 93rd Constitutional Amendment Act which eventually tried to replace collegium system was heard and finally struck down by the bench of five judges.[43] This was in contrast with previous practice of the Supreme Court. After the eleven-judge bench decision in *Golak Nath* v. *State of Punjab*,[44] the Parliament enacted 24th Constitutional Amendment Act. The sole reason of this amendment was to remove the difficulties created by the eleven-judge bench. This amendment was challenged and thirteen-judge bench was constituted in *Kesavananda Bharti* v. *State of Kerala*.[45] But in the NJAC case Supreme Court did not find substance in it. A division bench of Supreme Court in *Rajbala*v. *State of Haryana*[46] precluded illustrious doctrine of substantive due process,[47] the debate which

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[34]*Id*. at para 90.
[35] *Islamic Academy Education* v. *State of Karnataka* (2003) 6 SCC 697.
[36] *T.M.A. Pai Foundation* v. *State of Karnataka* (2002) 8 SCC 481.
[37]AIR 2005 SC 3226.
[38](2005) 7 SCC 625.
[39]*S. R. Bommai* v. *Union of India* (1994) 3 SCC 1.
[40]*Supreme Court Advocates-on- Record Association* v. *Union of India*, W.P. (C) No. 13 of 2015. (Popularly known as the 'Fourth Judges' case).
[41] *Supreme Court Advocates on Record Association* v. *Union of India*, AIR 1994 SC 268. (Popularly known as the 'Second Judges' case).
[42] *Re: Special Reference* No. 1 of 1998 (1998) 7 SCC 739 (Popularly known as the 'Third Judges' case).
[43]It would be pertinent here to mention that surprisingly this matter was allotted to a three-judge bench.
[44]AIR 1967 SC 1643.
[45](1973) 4 SCC 225.
[46] Writ Petition (Civil) No. 671/2015.
[47]"Constitutionality of the Haryana Panchayati Raj (Amendment) Act, 2015 (Act 8 of 2015) was in question. The impugned Act included five categories of persons ineligible to contest elections for certain offices in Panchayats in Haryana: One; persons against whom criminal charges of a certain kind are framed, two; persons

started in *Maneka Gandhi* v. *Union of India*[48] and practiced in many landmark cases till recently in the *Ramlila Maidan Incident*[49] and *Smt. Selvi Devi case*.[50]

IV. DOCTRINE OF *PER INCURIAM VIS-À-VIS* REFERRAL OF MATTER TO LARGER BENCH

Under the Land Acquisition Act of 2013, if land was acquired five years prior to the commencement of new Act and if compensation was not paid, acquisition would lapse. The legislative intent was to give a better deal to farmers under the new and progressive law.[51]

A three-judge bench of Chief Justice R.M. Lodha, Justice Madan B. Lokur and Justice Kurian Joseph in the Pune Municipal Corporation case[52] unanimously held that 'paid' would mean compensation offered or rendered and deposited in court. The bench also held that Land Acquisition Act being expropriatory must be strictly followed. On February 8, 2018 in the Indore Development Authority case, Justice Arun Mishra, Justice Adarsh Kumar Goel and Justice Mohan M Shantagoudar by a majority of 2:1 held judgment of three judges in Pune Municipal corporation as *per incuriam*. In fact, majority judges Justice Mishra and Justice Goel gave as many as 11 reasons for holding Lodha's opinion *per incuriam*. Justice Shantagouudar did not agree to this. The court held that once compensation has been unconditionally offered and refused, it would satisfy the requirement of payment of compensation if it was deposited in the government treasury. Thus, two judges considered referring the matter to larger bench but still decided against it.[53]

On 21st February, Justice Lokur's bench was surprised to know that a three-judge bench has declared a decision of an earlier three judge bench judgment of which both Justice Lokur and Justice Joseph too were part as *per incuriam*. Justice Lokur's bench therefore stayed hearing in High Courts and requested other benches of the apex court to wait till his bench hears the matter after Holi on the issue of referring the issue to the CJI for the constitution of the larger bench. The referring of the case to CJI in between by the benches of Justice Goel and Justice Mishra was therefore not really necessary as in view of detailed judgment of Justice Mishra, Justice Lokur's bench was itself likely to do the same on the next hearing. Now CJI has constituted a five-judge bench which will try to resolve the conflict between 2014 and 2018 orders of the court.[54]

The doctrine '*per incuriam*' was evolved by English courts in relaxation of the rule of *stare decisis*. The Halsbury's Laws of England[55] explains, "a decision is *per incuriam* when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it or decision given in ignorance of the terms of a

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who fail to pay arrears, if any, owed by them to either a Primary Agricultural Cooperative Society or District Central Cooperative Bank or District Primary Agricultural Rural Development Bank, three; persons who had not paid their electricity dues, four; persons who had not specified their educational qualifications and five; persons who did not have functional toilet in their homes." The Act was challenged on the grounds that it is arbitrary and wholly unreasonable and therefore violative of Article 14 of the Constitution. Though the court observed that Act cannot be declared unconstitutional only on the ground of arbitrariness but refused to apply doctrine of substantive due process. The court observed that courts in India cannot go into the question of wisdom of legislative choices unless the statute is otherwise violative of some specific provisions of the Constitution.

[48] AIR 1978 SC 597.

[49] (2012) 5 SCC 1.

[50] *Smt. Selvi* v. *State of Karnataka* (2010) 7 SCC 263.

[51] *Supra* n.30.

[52] (2014) 3 SCC 183.

[53] *Supra* n. 30.

[54] *Ibid.*

[55] See, 26 *Halsbury Law of England* 297-98, para 578 4th edn.

statute." In *Young* v. *Bristol Aeroplane Company Limited*[56] the House of Lords observed that '*Incuria'* literally means 'carelessness.' In practice *per incuriam* appears to mean *per ignoratium*. Lord Godard, C.J. held it to mean in *Huddersfield Police Authority* v. *Watson,*[57]"when a court has acted in ignorance of a House of Lords decision, or when the decision is given in ignorance of the terms of a statute or rule having statutory force." He further observed that, where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam.*[58]

A decision *per incuriam* is not a binding precedent, that is, without the Court's attention having been drawn to the relevant authorities or statutes. The '*per incuriam'* rule is strictly and correctly applicable to the *ratio decidendi* and not to *obiter dicta.* This is a significant rule of judicial propriety and our Supreme Court has followed it in many decisions.

Justice Sabyasachi Mukharji in famous *A.R. Antulay* v. *R.S. Nayak,*[59] observed "*Per incuriam* are decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong." At a later stage of the decision it was observed that "It is a settled rule that if a decision has been given per incuriam the court can ignore it."

In the case of, *State of Assam* v. *Ripa Sarma,*[60] it was held that, "a judgment rendered in ignorance of earlier judgments of benches of co-equal strength would render the same *per incuriam,* and thus, such a judgment will not be elevated to the status of precedent."[61] In the case of, *Jai Singh* v. *M.C.D,*[62]it was held that, "judicial discipline and propriety demands that, there should be consistency in the views as regards the decisions rendered by co-equal benches on the same issue. However, subsequent bench is to follow the decision rendered by the earlier co-ordinate bench, except in compelling circumstances, such as where the order of the earlier bench can be said to be *per incuriam.*" Similarly, in the case of *K.H. Siraj* v. *High Court of Kerala,*[63] it was held that, "when a decision is rendered by the High Court without having regard to the relevant line of decisions rendered by the Supreme Court, then such a decision of the High Court is *per incuriam*."

The Chief Justice of India (CJI) is the head of judiciary but he is one amongst equals. Constitution does not make CJI 'master of rolls'. It is the Supreme Court Rules that declare him so. As 'master of rolls', he constitutes benches in his administrative capacity.[64] Even judiciary while acting administratively is 'State' under Article 12 and thus cannot violate fundamental rights. Since even CJI is bound by rule of law, he is not supposed to act

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[56](1994) All ER 293.
[57]1947 KB 842: (1947) 2 All ER 193.
[58]*Supra* n.30.
[59](1988) 2 SCC 602.
[60](2013) 3 SCC 63.
[61]See also, *Siddharam Satlingappa Mhetre* v. *State of Maharashtra,* AIR 2011 SC 312. While dealing with the issue of 'per incuriam', a two- Judge Bench, after referring to the dictum in *Bristol Aeroplane Co. Ltd.* case and certain passages from Halsbury's Laws of England has ruled that "the analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength."
[62](2010) 9 SCC 385.
[63](2006) 6 SCC 395.
[64] Article 143(3) read with Supreme Court Rules.

arbitrarily either in the constitution of benches or in preparing the roaster. Idea of constitutionalism demands that every authority should have limited powers only. Vesting of absolute powers in any office is anti-thesis of constitutionalism. There is a difference between supremacy of the Supreme Court and Supremacy of the Constitution. Supreme Court is not supreme, Constitution is.

The Supreme Court has made it clear that only a Bench of the same quorum can question the correctness of the decision by another Bench of co-ordinate strength, in which case the matter may be placed for consideration by a Bench of larger quorum. In other words, a Bench of lesser quorum cannot express disagreement with, or question the correctness of, the view taken by a Bench of larger quorum. A view of the law taken by a Bench of three judges is binding on a Bench of two judges and in case the Bench of two judges feels not inclined to follow the earlier three-Judge Bench decision then it is not proper for it to express such disagreement; it can only request the Chief Justice for the matter being placed for hearing before a three-Judge Bench which may agree or disagree with the view of the law taken earlier by the three-Judge Bench. Additionally, a matter is to be referred to larger bench where in a two-judge bench, both judges wrote separate dissenting notes and hence could not arrived at any conclusion.

However, there should be a judicial order for referring the matter to a larger bench. A thirteen-judge bench was constituted to reconsider the basic structure doctrine laid down in *Kesavananda Bharati* [65] without there being any judicial order of reference for such reconsideration. When after two days of tense hearing, it was pointed out that CJI had constituted the bench to reconsider basic structure case without any judicial reference, the bench was hurriedly dissolved. A worried Nani Palkhivala had to write to Indira Gandhi opposing such an unnecessary reconsideration.

V. CONCLUSION

The Supreme Court today, it appears is losing its original character of final constitutional court of the country and has cramped itself into a general court of appeal by engaging in dispute resolution. At present Supreme Court is functioning with a Chief Justice's court and 13 to 14 division benches of two-judges. Each one is Supreme Court in itself, resulting into the problems of inconsistency, smaller benches deciding constitutional questions and smaller benches modifying/overruling previous larger bench decisions. In contrast constitutional court in United States, United Kingdom, Australia, Canada and South Africa sit either *en bank* or in large benches.[66]

As the final doctor of legal and constitutional maladies, the Supreme Court has to lay down law for all the courts in India. Thus, it is imperative that Supreme Court ideally should sit as full bench or with five/seven/eleven judges to decide matters of constitutional/national/public importance only; and constitute four regional appellate benches or four national courts of appeal in the Delhi, Kolkata, Mumbai and Chennai which would entertain the appeals from the 24 High Courts and Tribunals.

A policy has to be formulated for allotment of cases to benches. Academic and professional experience relevant to the cases; other experience like political, administrative, technical; any earlier expression of opinion on the matters allotted; area from which the judge comes in a volatile criminal matter, regularly figuring in the media, shareholding of the judge

[65] AIR 1973 SC 1461.
[66] *Supra* n.30.

in vital economic or financial matters may be taken as relevant factors in this regard. Translucent policy to constitute benches shall also remove possibility of bench hunting which may be heard in the corridors of the Supreme Court.

WHY IT IS SO IMPORTANT TO GIVE IMPORTANCE TO CULTURE?

*Manju Chellani**

I. INTRODUCTION

Culture is all-pervasive in spirit, thought, environment and communication. The significance of culture in the maintenance and continuance of our physical, mental and spiritual environment, though underplayed earlier, has been getting acknowledged in the past few decades. Of course, this well-being is part of the entire gamut of what we humans wish to maintain for our own lives and also to pass on to our future generations intact, underpinning the entire journey of the thought on sustainable development (SD). In fact, for some time now, the idea that culture should be formally recognized as the fourth pillar of SD and inform all public policies has been gaining currency. United Nations Educational, Scientific and Cultural Organization (UNESCO) recognizes that culture is who we are and what shapes our identity. It also acknowledges the role of culture through a majority of the Sustainable Development Goals (SDGs).[1] Hence it is inseparable from the three pillars with which the concept of SD started its journey- economic, social and environmental. It is now clear that culture is the "unofficial" fourth pillar of SD.[2]

Like SD, culture too is a multi-dimensional entity; with foundations in a multitude of paradigms from social sciences, law, socio-linguistics, sciences etc. With reference to law, culture is central to many of its principles; especially of international law (IL). These include precautionary principle, inter and intra-generational equity, common but differentiated responsibilities and many others. As Cocchi says "Cultural heritage is linked to humanity. It represents the symbolic continuity of a society beyond its contingent biological existence. Thus, the obligation to respect cultural heritage is closely bound with the obligation to respect human rights and to sanction its most serious breaches with individual criminal liability under international law."[3]

In this article, the principle of intergenerational equity (IGE) will be highlighted and examined vis-à-vis culture. The thrust would be on demonstrating that IGE is a key element in conservation of culture/cultural heritage (CH). And in its train, it is envisaged that it would impact SD positively. It is certainly true that culture is a continuum from huge metal statues to Christmas dinner recipes; from palaces to techniques of building hut-roofs; from sowing patterns of seeds to sand-dunes spreading over miles; and everything else in this world- tangible and intangible. However, in the following sections, the focus is on the tangible CH which is in the form of cultural objects (CO) constituting archetypal symbols of the "parent" country or region under discussion. The thrust of the discussion would be on the role of return

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[1] *Available at*: https://en.unesco.org/sdgs (last visited on Nov. 25, 2018).

[2] *Available at* https://en.unesco.org/new/en/culture/themes/culture-and-development/culture-for-sustainable-urban-development (last visited on Nov. 25, 2018).

[3] Michela Cocchi, "Essay on Cultural Rights: The Protection of Culture as a Shared Interest in Humanity", 1(1) *Cultural Heritage & Arts Review* 18-22 (Spring, 2010).

of these CO vis-à-vis IGE. A discussion of IGE involving intangible CH would be of a very different nature.

To this end, an attempt will be made to:

1. Analyze the importance of culture in the realms of human experience and SD.
2. Examine the principle of IGE in culture with special reference to restitution[4]/repatriation[5] of CH to the "parent" country.[6]

It is appropriate to mention that in this article, wherever found suitable, the single word "culture" is used in various contexts such as to denote culture, cultural heritage, cultural diversity, cultural objects, tangible culture, intangible culture, moveable culture, immoveable culture etc. However, wherever a precise or technical term has to be used; or whenever to use "culture" would be confusing, the exact terminology has been used.

II. The Importance of Culture for Humanity

The role of culture in human lives defies definition. Significant artifacts of tangible or intangible culture tie up the morale and psyche of an entire people who identify with it because it is not today or yesterday which is wrapped around it. The unconscious memories of the ancestors gone long past; stories never heard but only felt; and the hope of eternal continuity, all these and more are hidden away in an artifact. This has long been recognized and this is one of the reasons for targeting the language, museums, places of worship and places of recreation etc in times of war or other conflicts. Once you destroy a large number of moveable and immoveable cultural objects (CO), you damage the morale and psyche of an entire people, making it easier to subdue them. And once you trample away intangible CH like language and religious rituals, you may subsume their ethnic identity in just one or two generations. Another significant realization has been that a culture may be peculiar to a particular community or region but it plays its integral role in the fabric of the cultures of the entire world. Neither would be same without the presence of each other.

These realizations have long been reflected in the development of international law on the protection of different manifestations of culture and one very early reminder of this is "being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[7]

This is not to say that culture should be static and any change to it is a reprehensible human intervention. All manifestations of culture (and natural environment) including tangible and intangible, moveable and immoveable also undergo natural and unintentional human wear-and-tear. These have to be perceived as normal and desirable. After all, in order to survive, both culture and nature have to gather force from the present and emerge contemporaneous no matter how ancient they are. Notwithstanding this, sudden and

[4] Restitution is done to an individual or community.
[5] Repatriation is the return done at the request of the government of a nation/state.
[6] The importance of culture in sustainable development as its fourth pillar was examined in detail by the author in an earlier conference paper: "Sustainable Development through Sustainable Principles: The Road to Rio+20 and Beyond" (Paper presented at the International Conference on "Contribution of International Environmental Law for Sustainable Development: Global and National Perspectives", organized by the Faculty of Law, University of Delhi, 17-18 February 2012).
[7] Preamble; Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954.

unprecedented havocs are wrought and the loss is irretrievable. At such times, just a single reminder can also be of poignant value and help. Here one cannot but remember the phenomenon of the "Miracle Pine" the only one surviving the ravages of the 2011 tsunami from the 70000 trees lining the shore of Rikuzentakata city in Japan. Just looking at it gave the local people hope to live after the crushing emotional and economic losses during the tsunami. After it was discovered to be dying due to excessive salt water in its roots in 2012, it was restored artificially with a great deal of skill and money and was made the centerpiece of the memorial park.[8] Thus the "protection" of culture cannot be total or pristine. It is required only in terms of what is possible and realistic.

It goes without saying that the strong attachment of most people with their culture is not limited to its material and tangible manifestations. The intangible culture is equally important for our healthy identification with and pride in what we consider "our heritage." In a very broad context, "our heritage" should and does occupy the entire gamut of cultural heritage, cultural diversity, cultural objects, tangible culture, intangible culture, moveable culture, immoveable culture etc. belonging to all peoples on this planet. However, in actual terms, the scope of most humans extends to the culture(s)he is born in and/or they live their lives out in. And this is what they would like to pass on to their children and the generations after that – in more or less the same form.

As an example, over millennia, significant CO have been removed from their places of origin as part of war-plunder, robbery for financial gains, love for their aesthetics on part of powerful persons, destruction by natural or man-made disasters and so on. In case they can be returned, the occasion becomes all the more elevated by the consciousness of this loss and retrieval. This is the quintessential crux of the demand for the return of the Parthenon Marbles to Greece.[9]After so many decades, it is still one of the most dramatic and vociferous debates in the return of historically acquired CO.

This reality of the human experience has been recognized over the past few decades and incorporated in the work of academia, policy-makers, ground-level workers; especially in the SD forum. Though coming into its own for some time earlier, conceptually SD was crystallized in the late 1980s, in *Brundtland Report.*[10] It emphasized that all should consume only their fair share and opt for low-consumption life-styles. It encourages a holistic value-system and above all, equity. Hence it can be said that SD has truly equitable foundations, by way of its three pillars. But it has been amply demonstrated over the decades that equity has not come about. It has been now theorized that this may be due to imposition of alien solutions on communities regardless of their culture and history. This is what makes the solutions unacceptable and hence unworkable. After all, the economic, social and environmental pillars of SD are necessarily so permeated by "how" and "why" people do (or do not do) certain things that culture is inseparable from them. It is only a matter of form that culture is now acknowledged as the fourth pillar of SD. In fact, culture may eventually be viewed as the primary pillar which single-handedly supports the other three. "Development interventions that are responsive to the cultural context and the particularities of a place and

[8] "The Fascinating Story of Rikuzentakata's 'Miracle Pine' as its Iconic Symbol of Hope", *available* at: jpninfo.com/43201(last visited Nov. 8, 2018).

[9]A discussion of this well-known controversy will be taken up in a following section of this article.

[10] World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987). Its popular name: *Brundtland Report*, derives from the name of the chairperson. Very famously, it defined SD as development that "meets the need of the present without compromising the ability of future generations to meet their own needs", at ix. This definition has been criticized over years variously as being too vague, inadequate, anthropocentric etc. However, for want of a better definition, it is still the most commonly used one and forms the basis of many documents relating to SD.

community, and advance a human-centered approach to development, are most effective, and likely to yield sustainable, inclusive and equitable outcomes. Acknowledging and promoting respect for cultural diversity within a human right based approach, moreover, can facilitate inter-cultural dialogue, prevent conflicts and protect the rights of marginalized groups, within and between nations, thus creating optimal conditions for achieving development goals. Culture, understood this way, makes development more sustainable."[11]

It follows that UNESCO also considers its work on cultural diversity and culture conventions as imperative for the implementation of the 2030 Agenda for Sustainable Development.[12] As another agency of the United Nations has said, "Cultural factors also influence lifestyles, individual behavior, consumption patterns, values related to environmental stewardship, and our interaction with the natural environment. Local and indigenous knowledge systems and environment management practices provide valuable insight and tools for tackling ecological challenges, preventing biodiversity loss, reducing land degradation, and mitigating the effects of climate change."[13]

As Nurse had put it succinctly some time back, "Culture should be viewed not just as an additional pillar of sustainable development along with environmental, economic and social objectives because people's identities, signifying systems, cosmologies and epistemic frameworks shape how the environment is viewed and lived in. Culture shapes what we mean by development and determines how people act in the world."[14]

III. INTERGENERATIONAL EQUITY AND CONSERVATION OF CULTURAL HERITAGE

A. Intergenerational Equity as a Principle

IGE has long been developing as a principle of international law and its import was acknowledged by law-makers, judiciary and jurisprudentialists. The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment said "to defend and improve the human environment for present and future generations had become an imperative goal for the mankind."[15]In his seminal article on environmental ethics "The Rights of Animals and Unborn Generations" the philosopher Joel Feinberg spoke of the standing of the present generation to speak on behalf of the future generations and represent future interests. He said, "The rights that the future generations certainly have against us are contingent rights, the interests that they are sure to have when they come into being (assuming of course that they will come into being) crying out for protection from invasions that can take place now."[16]

IGE has been the subject of much legal and philosophical discourse and one of its best-known proponents, Prof. Edith Brown Weiss, has said, "Every generation receives a natural and cultural legacy in trust from its ancestors and holds it in trust for its descendants.

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[11]UN System Task Team on the post-2015 UN Development Agenda, *Culture: a driver and an enabler of sustainable development (Thematic Think Piece)*(UNESCO, 2012), *available at*: www.org/millenniumgoals/pdf/Think%20Pieces/2_culture.pdf (last visited Nov. 8, 2018).

[12]*Available at*: https://en.unesco.org/new/en/culture/themes/culture-sustainable-development (last visited Nov. 8, 2018).

[13]*Supra* n. 12 at 4.

[14] Keith Nurse, "Culture as the Fourth Pillar of Sustainable Development" (2006), *available at*: https://pdfs.semanticsscholar.org/92da/e4886a02f1b27dd4131db5912aae6b7074f.pdf (last visited Nov. 8, 2018).

[15]*Available at*: www.un-documents.net/unchedec.htm> (last visited Nov. 8, 2018).

[16] W. T. Blackstone (ed.), *Philosophy and Environmental Crisis* 66 (University of Georgia, 1974).

This trust imposes upon each generation the obligation to conserve the environment and natural and cultural resources for future generations. The trust also gives each generation the right to use and benefit from the natural and cultural legacy of its ancestors."[17] By now, the principles of IGE are very clear, conservation of options which would ensure that the future generations would inherit a diverse and healthy world which would let them live life to the fullest; but this does not mean that we ignore the needs of the present generation. Second principle is that of conservation of quality for envisage able human functions. The third principle is that of conservation to access.[18]

Besides coming in its own as the focus element of SD, the principle of IGE was reinforced at the 1992 United Nations Conference on Environment and Development.[19] And then also ten years later in the World Summit on Sustainable Development, 2002 whose Resolution 1 (6) says, "From this continent, the cradle of humanity, we declare...our responsibility to one another, to the greater community of life and to our children."[20]

And the judicial voice was not far behind. One of the strongest ones was of Judge Weeramantry who referred to IGE in *Denmark* v. *Norway* and specifically to "the concept of wise stewardship [of natural resources] [...] and their conservation for the benefit of future generations.[21] The voice echoed a few years later in the case from Philippines, *Minors Oposa* v. *Secretary of the Department of Environment and Natural Resources*.[22] In this case45 children, represented by their parents, along with Philippines Environmental Network Inc., claimed that their rights of using and enjoying natural resources were violated because of the degradation of tropical rainforests due to cutting down of the timber. They had sought from the Court that the cutting down should be stopped. The Supreme Court said that the minors, through their parents, could sue on behalf of future generations too, along with their own, in a class suit. This is because a healthy ecosystem of the future would depend on the practices of today. And every generation has this responsibility towards the next generation. Culture deserves no less than true IGE too.

B. Intergenerational Equity in the Context of Culture

[17] Edith Brown Weiss, "In Fairness to Future Generations", 32(3) *Environment: Science and Policy for Sustainable Development* 6-31 (1990).

[18] Annika Oskarson, "Intergenerational equity – Protecting future generations through domestic action" (Master thesis, Faculty of Law, University of Lund) (Spring, 2009), *available at*: lup.lub.lu.se/luur. download (last visited on Dec. 6, 2018) for an interesting discussion of the origins, ramifications and applications of the principle of intergenerational equity.

[19] Held in Rio de Janeiro on 3-14 June 1992; where more than 170 countries and thousands of participants gathered, to reaffirm their commitment to the Stockholm Declaration to protect the environment for present and future generations and to implement the goals of SD. The Principle 3 of The Rio Declaration on Environment and Development 1992 says that: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations", *available at*: https://www.jus.uio.no (last visited on December 16, 2018); Article 3(1) of the United Nations Framework Convention on Climate Change states that: "Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities" (as reproduced in 9 May 1992 31 ILM 849); Preamble of the Convention on Biological Diversity whose Preamble also said: "Determined to conserve and sustainably use biological diversity for the benefit of present and future generations", *available at*: https://www.cbd.int/doc/legal/cbd-en.pdf(last visited on Dec. 16, 2018).

[20] *Available at*: www.un-documents.net (last visited on Dec. 16, 2018).

[21] See *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayem* [1993] Rep.3. Separate opinion of Justice Weeramantry at 174 as reported in: Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* 127-128 (Oxford University Press, New York, 2004).

[22] Reported in 33 ILM 173 (1994).

The World War II witnessed atrocities and violations of all conceivable human rights at an unprecedented scale. The post-war ambience reverberated with guilt and many collective resolutions. One of them was to prevent ruthless and reckless destruction of historical objects, buildings and landscapes which had survived for many centuries before the years of this war. These included symbols of religious, cultural and emotive significance. This was the genesis of the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954.[23] The contracting parties were determined to prevent the carnage they had witnessed just a few years back. It did not deal with IGE explicitly but its Preamble said, "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world" and "Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection." The recognition was certainly therein spirit even if not in emphatic, corporeal words – the recognition that cultures of all peoples of the world are equal, interdependent and their well-being is common responsibility of all.

One of the first explicit articulations of IGE in the contexts of culture and natural environment came with the UNESCO Convention Concerning the Protection of World Cultural and National Heritage, 1972.[24]Its importance was recognized as "…recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage referred to…"[25] Thus, CH and natural heritage were viewed as being inalienable and of equal consequence. The Article 7 of the 1997 Declaration on the Responsibilities of the Present Generations towards the Future Generations said, "With due respect for human rights and fundamental freedoms, the present generations should take care to preserve the cultural diversity of the humankind. The present generations have the responsibility to identify, protect and safeguard the tangible and intangible cultural heritage and to transmit this common heritage to future generations."[26]This idea was progressively fleshed out in each succeeding international convention on the protection of CH (formulated almost exclusively by the UNESCO).[27] The 2001 UNESCO Universal Declaration on Cultural Diversity says in its Article 1 "…In this sense it is the common heritage of humanity and should be recognized and affirmed for the benefit of the present and future generations."[28]The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003[29] reiterated this and said "…This intangible cultural heritage transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity…"[30] And it was also echoed by the 2005 Convention on the

[23]Hereinafter 1954 Convention.
[24] Hereinafter 1972 UNESCO Convention
[25] Art. 4.
[26]*Available at*: portal.unesco.org (last visited on Dec. 16, 2018).
[27]The 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects says in its Preamble: "Convinced of the fundamental importance of the protection of cultural heritage and of cultural exchanges for promoting understanding between peoples, and for dissemination of culture for the well-being of humanity and the progress of civilization". See also, "UNESCO-UNIDROIT Model Provisions on State Ownership of Undiscovered Cultural Objects", *available at*: https://www.unidroit.org/(last visited on Dec. 16, 2018).
[28]*Supra* note 26.
[29]*Ibid.*
[30] Art. 2(1). In its Preamble, it recognizes that the processes of globalization and social transformation, alongside the conditions they create for renewed dialogue among communities, also give rise, as does the phenomenon of intolerance, to grave threats of deterioration, disappearance and destruction of the intangible cultural heritage, in particular owing to a lack of resources for safeguarding such heritage

Value of Cultural Heritage for the Society (Faro Convention)[31] a few years later which said that a "heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generation."[32]

These developments were not in isolation though. They reflected the contemporary burgeoning thought in other areas of international law. This emphasis on the diversity of CH was a reverberation of the holistic, ecosystemic approach to biodiversity-conservation evolving then. It cannot but remind one of the most socially and environmentally relevant documents of our times, namely the Earth Charter, 2001.[33] There are strong parallels. The Principle 4 of the Earth Charter affirms IGE in natural heritage and CH by way of saying that we have to secure earth's bounty and beauty for present and future generations. We also have to transmit to future generations the values, traditions and institutions that support the long-term flourishing of human and ecological communities. Principle 12 (d) exhorts us to protect and restore outstanding places of cultural and spiritual significance. Both our natural heritage and the CH are viewed very eclectically. And it is not surprising that culture is now regarded as the touchstone of any development-initiative.

It is heartening to note that this evolution in thought didn't just theorize about abstruse legal principles; they brought "real" people and problems to fore.[34]The Preamble of the 2011 Recommendation on the Historic Urban Landscape clearly enunciates, "Considering that historic urban areas are among the most abundant and diverse manifestations of our common cultural heritage, shaped by generations and constituting a key testimony to humankind's endeavours and aspirations through space and time."[35] Of course, when we talk of any heritage, one "good" implication is that we are glad to have inherited it, to have enjoyed its beneficence. Furthermore, we wish to pass it on to others coming in this world after us, in the same condition even if we have not been able to improve upon it.[36] Even if one generation has suffered deprivation of its CH, this loss and memory should inculcate all the more urgency to retrieve it for the future generations. This is why there is a need to restore the equilibrium which encompasses the vital need for IGE.

IV. INTERGENERATIONAL EQUITY AND THE CONSERVATION OF CULTURAL HERITAGE IN THE "PARENT" COUNTRY

The discussion in this section will be focused on restitution/repatriation of CO. In most countries of the world, the cultural world around us has changed and is changing rapidly, especially since the last century. There are two reasons for this. First is the much higher incidence of destruction and damage to CH due to long-persisting conflicts, tensions and terrorism in almost all regions of the world which have no respect for its preservation. Indeed, much of the time, both tangible and intangible CH is targeted. To add to this, the

[31]*Available at*: https://www.coe.int/en/web/culture-and-heritage/faro-convention (last visited on Dec. 16, 2018).
[32] Art. 2(b).
[33]*Available at*: https://*earthcharter.org* (last visited on Dec. 16, 2018).
[34]The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005. Hereinafter 2005 UNESCO Convention. It went even further and urged us to pass on the "cultural" world at least as we found it ourselves which is a direct reference to the importance of IGE. In the same vein, the Preamble of the United Nations Declaration on the Rights of Indigenous Peoples 2007 also said that: "Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment", a*vailable at*: https://www.un.org/(last visited on Dec. 16, 2018).
[35]*Supra* n. 26.
[36] Though it may not be possible for us to calculate the needs of the future inhabitants of this earth, it is reasonable to suppose that their needs are at least same as ours.

reach of the war-weapons developed in the past century is far larger and more accurate than ever – making it easier to precisely attack any desired target. Furthermore, the processes inherent in erstwhile colonization had facilitated the permissions to transfer huge amounts of cultural artifacts from the colonized country of origin to that of colonizers. Many of these have not yet been returned to the country of origin, causing an inequitable state. The second reason is that while increased globalization, consumerism and modernization have caused an increase in the knowledge about protection and preservation of CH, the same factors have also resulted in an acceleration of different kinds of losses in CH. These include stealing and/or illicit exports and imports of "attractive" cultural objects; migration and urbanization resulting in languishing traditions; continued retention of cultural objects taken away during occupation or colonization; unsustainable development patterns which negatively impact the maintenance of environmental and cultural integrity; and so on.

Talking of restoring the balance or equity, it has been pointed out earlier in this article that to be able to enjoy our right to our cultural heritage, we must be able to be "with" it. And whatever the reasons for not being with it, solutions should be accessible. Logically these solutions, more or less, would pertain to (1) bringing to a halt/modifying activity, harming it; (2) increasing maintenance as per need; (3) restitution in case of loss; and/or (4) replication/replacement in case of destruction. If we take the required and appropriate action, the balance would be restored and we would be on our way to IGE. But what are the dynamics of this desired balance? There are two ways of looking at this- the nationalist and the internationalist. The first would entail the perception that CH originates from a particular community or region, and has been its integral part. It has shaped the people living there into what they are today. As such, that heritage is most "at home" in that particular region. After all it is the so many types of CH and their so many "homes" which has resulted in the cultural diversity(CD) of the world. And this genuine and consistent CD has been recognized as being imperative for a healthy planetary environment.[37] The internationalist view would be that CH (of any region or people) is part of the common consciousness and heritage of the entire world. It should not be claimed by any one country as entirely its own peculiar property. It is the common concern of all humankind to whom it belongs collectively. This is why it does not matter where it is placed right now. Whether due to illegal export or to former colonization, if it is placed right now in the famous and well-established museums, it will be better taken care of too. In any case, the national boundaries are no longer the same as when a CO was taken away, so it is not clear which country it should be returned to; especially when two adjoining countries are separated only by formal borders and not by history and culture. Moreover, the CO was legally appropriated at the time, as per the prevailing law of the land, whether during conflict, colonization or foreign rule.

It is suggested here that the answer lies somewhere in between the nationalist and internationalist viewpoints. This is because our life is a heritage bequeathed to us by our parents. The world around is our heritage and always in-the-making. Most of us want to keep it the way it is and change it only to make it better. Over civilizations, forces have overwhelmed and shattered the world around us to pieces, only to build them up rather different. Human history is a saga of changes, adjustments, destructions, progress and nostalgias. Wars, natural disasters, economic patterns, industrialization, colonization, epidemics have come and gone, uprooted and left cumulative marks on each individual, communities and the land. Humans have survived all because we have held on and held close to us what was precious and vital for our life on this earth. Both tangible and intangible resources around us allow us to spring back to life and health. However, when we are deprived of these resources and remedies, survival becomes difficult and ultimately

[37] This is the entire tenor of the 2005 UNESCO Convention.

impossible. The mainstay of these resources is the stability of the biotic environment and the socio-cultural milieu. Building of new huts; finding alternative sources of food; surviving loss of families and learning to live with other members of the community; finding succor in oral traditions when temples and books have been wiped out – can only happen if there has been maintained some environmental and cultural integrity which is familiar and continuous. As the Preamble of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970[38] says "...Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting..."

To counter this, it is generally said that the CO in question had been shifted outside their place of origin as per the law of the land. Hence there is no obligation for its repatriation. This may (at times) be technically correct. However, this technicality has to be juxtaposed with the realities that an occupied or colonized nation is/was hardly ever in the position of refusing to give up its cultural treasures to the conqueror or the sovereign. Most often, permission was not even required. Much more immediate concerns for preservation of life, family, property, livelihood, food took over. Moreover, the object may have been in the power of an erstwhile ruler who gave it up to the more powerful *de facto* ruler. Under duress, his/her personal circumstances and actions at a particular point of history cannot deprive people for posterity. In any case, to subject all aspects of return of CO to the general property-law – with its rules of transfer and possession and so on – is in itself a refusal to see the true significance of objects of cultural value. Equity is higher than such rules.

Coming to another point, the concern of the countries and/or the museums should also be taken into account. In case it is felt that the "parent" country may not be able to take care of the CO upon return from a state-of-the-art museum it is currently residing in, there is another solution besides refusing to return in altogether. Technical advice and other resources may be provided to the "parent" country for providing the appropriate and continuous protection. At the same time, there need not be empty glaring spaces left in the museums where the precious objects were placed for so many years. High-tech replicas should fill in those spaces and continue to enthrall and educate the millions of visitors they receive annually.

This was also the philosophy behind the Icelandic Manuscript's return case where the issue of repatriation of cultural treasures had been taken up fully and beautifully. The Icelandic Manuscripts were vellum and also paper manuscripts of the medieval saga literature of Iceland. They were perceived to be symbols of Iceland's oneness and cultural identity.[39]They were removed to Denmark in the 18th century while Iceland was Danish colony. After Iceland's separation from Denmark in 1945, the former started making efforts to get them back. In the early 1950s, a group of academicians argued strongly against the return of the Manuscripts from Denmark on the grounds that they were not specifically Icelandic but "Old Nordic" and therefore a pan-Scandinavian treasure. It was only by accident that they were written in the Icelandic language. They ought to remain in Copenhagen, which is a renowned academic centre with all technical and institutional resources for making the Manuscripts available for scholarship. They also claimed that Iceland lacked all of the above and additionally, conservation-resources. But Iceland persisted in its demand for return. At last and against all of these arguments, the return was done

[38] *Supra* n. 26.

[39] For a detailed discussion of their history and the entire mechanism of their return to Iceland, refer to Jeanette Greenfield, *The Return of Cultural Treasures* 10-46 (Cambridge University Press, United Kingdom, 1989). Greenfield comments that this case serves as an international model for other cultural restitutions.

ceremoniously and voluntarily in 1971. This is a perfect illustration of moral obligations and the sense of natural justice overriding the legal obstacles in effecting the return of CP which was recognized as being of the utmost spiritual and cultural significance to the people (of Iceland).

But the nationalist view does not always prevail. The foremost example of the internationalist view is the plethora of arguments against the return of the Parthenon/Elgin Marbles from England to Greece. These Marbles were part of the Parthenon in Athens and now they are in the British Museum. It is not their mere beauty but their spiritual, religious and cultural connotations that led the Greek people to want them back in their country. This is despite the fact that they have been housed in the British Museum in England for decades. United Kingdom's position is that it is not against the principle of return as such but that only illegally acquired objects are returnable. They were acquired by Lord Elgin who was ambassador of the United Kingdom to the court of the Sublime Porte. The Marbles were taken from Athens which was under the occupation of Turkey at that time. The legality of the acquisition of the Marbles has been discussed *ad infinitum* and the real details have been clouded over time. But the true issue here is that regardless of the facts related to their acquisition, the Marbles must be returned as they belong to the Greek people. United Kingdom says that there is no reason to return them. But by the same logic, they need not be housed in the United Kingdom either since they are not part of its integral culture.[40] The debate is still on. There are similar issues around the returns of Rosetta Stone (to Egypt); Kohinoor diamond (to India);[41] Old Fisherman from Aphrodisias (to Turkey) – among many others.

A CO does not cease to be part of the collective historical heritage of humankind if it goes "home." Its universality will not shift with its journey. Its well-being, care and conservation remain the concern and responsibility of the international community. Hence if a CO goes back to its place of origin, it would definitely serve the cause of IGE. Furthermore, as Scarabello has pointed out, the value of cultural heritage is not based on its value or exclusivity but on its importance for the rights and identities of the humans with whom it is associated.[42]

In this respect, it is heartening to hear about the striking moves in the recent decades to restore a group of COs to the families/heirs of the former owners. These comprise the cultural treasures which were forcibly taken by the German/Nazi authorities from their Jewish owners during the 1930's and 1940's.[43]Employing ingenious methods to effect these repatriations/restoration, the overriding consciousness is that a plunder needs to be "made

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[40] *Id*. at 47-105. See also, M. Chellani, "International Legal and Ethical Arguments for the Return of the Parthenon Marbles: A Critique." (The author was invited to present a paper at the Conference: "Repatriation of the Parthenon Sculptures: Historical, Cultural and Legal Aspects", held in Athens, Greece, jointly organized by the Cultural Horizons, the Centre of European Studies and Humanities and the University of Athens, under auspices of the Hellenic Ministry of Culture and UNESCO, in May 2000. The author could not travel but this paper was published in proceedings of Conference).

[41] Saby Ghoshray, "Repatriation of the Kohinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage", 31(3) *Fordham International Law Journal* 741-780 (February, 2008) for a scintillating discussion about the return of the Kohinoor diamond.

[42] See Caterina Scarabello, "The Human Dimension of Cultural Heritage: Are we Moving towards a Human Rights Based Approach to the Protection of Cultural Heritage?", *available at*: www.academia.edu/24738129/The_human_dimension_of_cultural_heritage_are_we_moving_towrds_a_human_rights_approach_to_the_protection_of_cultural_heritage>(last visited on Dec. 16, 2018).

[43] This was the primary motivation behind the framing of the 1954 Convention.

good." And in many cases, these have been effected by private huge museums themselves.[44] Given the horrific circumstances surrounding the persecution of Jews during the period, the restoration could have been bitter-sweet.

V. CONCLUSIONS AND FINAL COMMENTS

The discussion in this article has attempted to examine

1. The significance of culture for humanity in general; and by implication in SD.
2. How IGE works in the realms of culture.
3. How is IGE served by restitution/repatriation of CH to the "parent" country.[45]

It has been demonstrated that culture is inextricably bound up with human life and all its experiences. As such, the notion of any activity including SD cannot be devoid of a consideration of culture. Justice, in its ultimate form, lies in IGE. Hence "cultural justice" (CJ) may be said to be delivered when IGE is achieved. In one of the (selected) areas of CH, it was examined if repatriation/restitution of CO could play a part in this IGE and CJ? It is hoped that it has been established by the arguments of this paper that this role is both positive and imperative. But neither IGE nor the role of CH in human life is limited to CO. It is much more far-flung and is slowly but surely gaining ground.

In the opinion of the author, nothing sums up better all that has been said in this article than the words of Mr. Ertugrul Gunay, Turkey's minister for culture (2007-2013), "Artifacts, just like people, animals or plants, have souls and historical memories. . . When they are repatriated to their countries, the balance of nature will be restored."[46]

[44] As a related example, the painting: "Deux Femmes Dans Un Jardin" by the classical painter, Renoir, was stolen by the Nazis from a bank vault in Paris in 1941. It had belonged to an art-collector Alfred Weinberger in pre-war Paris. After it had come to the Christie's Gallery, New York in 2013, it was returned to Weinberger's sole surviving heir Sylvie Sulitzer, his grand daughter. It was done in a ceremony at the Museum of Jewish Heritage in New York, United States of America, *available at*: https://edition.cnn.com/style/article/nazi-renoir-stolen-art-trnd/index.html(last visited on Nov. 16, 2018).

[45] *Supra* n. 6.

[46] *Availableat:*https://mic.com/articles/76321/9-priceless-artifacts-museums-should-return-to-their-home-countries#(last visited on November 16, 2018).

CRITICAL ANALYSIS OF LAW RELATING TO LATE-TERM ABORTIONS OF CHILD RAPE VICTIMS

*Namrata Solanki**

I. INTRODUCTION

Two cases of late-term abortion of child rape victims in 2017, which created pandemonium were of a 10-year-old and a 13-year-old child, both of whom sought permission from the Supreme Court to abort their pregnancies which had crossed twenty weeks. The 13-year-old child was permitted to abort, while the 10-year-old child was not allowed to abort. She later gave birth to a child. Words would fall short to describe the extremely traumatic, painful, humiliating, frightening and psychological suffering that a minor rape victim undergoes after being raped. This is very unfortunate! The cases of rape against children rose by 82% from 2015 to 2016.[1] The figure of 19,920 children being raped in 2016[2] makes us to think about the consequences that a child faces after rape. One of the most atrocious aftermath of rape is pregnancy, the cases of which are increasing. Time and again, the victims have had to knock the doors of the Courts to seek permission to abort late-term pregnancies. The verdicts in such cases are not same always.[3] For the purpose of this paper, late-term abortion is meant as the abortion of pregnancy beyond the legally permissible limit i.e. 20 weeks as per the Indian law.

II. RIGHT TO ABORTION: CONSTITUTIONAL PERSPECTIVE

Article 21 of the Constitution of India which guarantees right to life and personal liberty has been interpreted broadly to include various facets. Over the years a broader meaning of life has been attributed to mean not only animal existence but a dignified life with all its concomitant attributes like right to healthy environment, proper health and so on.

A very expansive interpretation was made in the case of *Munn* v. *Illinois*[4], an American case while dealing with the concept of life:

> "by the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. ….."

Article 21 of the Constitution of India, which guarantees life and personal liberty, has been interpreted to include rights of women, of which right to make reproductive choices is significant. "Right to reproductive choices would include right to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction

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[1]As per NCRB Report, 2016. Crime in India 2016, Statistics, National Crime Records Bureau, Ministry of Home Affairs, Government of India.

[2]*Ibid.*

[3]The petitioner who was a minor rape victim was allowed to terminate the pregnancy in *D. Rajeswari* v. *State of Tamil Nadu*, 1996 Cri.LJ. 3795. The Madras High Court did not allow termination of pregnancy in *V. Krishnan* v. *G. Rajan alias MadipuRajan* (decided on 2 December, 1993).

[4]94 U.S. 113(1877).

whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods."[5] Several international Conventions on Human Rights also recognise abortion as a right of women.

Rape is not just an offence but is also a violation of the most important fundamental right of a woman i.e. right to life. The constitutional validity of the law allowing abortion was a matter of debate across the world. A decision of the United State Supreme Court which became one of the most politically significant decision is *Roe* v. *Wade*.[6] It established that that most laws against abortion violate the constitutional right to privacy. Thus, it overturned all State laws restricting abortion that were inconsistent with the decision. Jone Roe wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the then prevalent state of medical knowledge, the decision established a system of trimesters that attempted to balance the State's legitimate interests with the individual's constitutional rights. The Court ruled that the State cannot restrict a woman's right to an abortion during the first trimester, the State can regulate the abortion procedure during the second trimester "in ways that are reasonably related to maternal health" and in the third trimester, demarcating the viability of the foetus, a State can choose to restrict or even to prescribe abortion as it would deem fit. It was held that "childbirth endangers the lives of some women, voluntary abortion 'at any time and place' regardless of medical standards would impinge on a rightful concern of the society. The woman's health is part of that concern, as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one."

In the case of *Suchita Srivastava* v. *Chandigarh Administration*[7], the Indian Supreme Court observed that in the case of pregnant women there is also a "compelling state interest in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled." Hence, the provisions of the Medical Termination of Pregnancy Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

When it comes to the termination of pregnancy of child rape victims, it is important to strike a balance between the right to life of the victim bearing the child and the unborn child, the balance of which would always turn towards the child rape victim. In case of *R. and Anr.* v. *State of Haryana*,[8] it was observed by the Court that:

> "No doubt, the protection of right of unborn child is an obligation cast upon the State under the Constitutional provisions, yet in view of the unambiguous language of Section 5 of the Medical Termination of Pregnancy Act, 1971, the conflict between the right to life of the mother and the right to life of the unborn child would yield in favour of the right to life of the mother. To force a woman to continue with the pregnancy which she does not want to continue is an infringement of right to privacy and dignity of the woman as well as an infringement of the right to a healthy and dignified life of the nascent life in her womb."

Abortion is multi-faceted because it involves the culmination of many aspects such as

[5] *Ashaben* v. *State of Gujarat*, 2015 (4) Crimes1 (Guj.).
[6] 35 L Ed 2d 147: 410 US 113 (1973).
[7] 2009 (9) SCC 1.
[8] Decided on 30 May, 2016, CWP-6733-2016.

religion, ethics, medicine and law.[9] "Abortion is an issue overshadowed and shrugged with glaring questions of morality, infanticide, suicide, ethics, religious beliefs and women's rights. To what amplitude, abortion should be permitted; encouraged, restricted or repressed is a social issue that has effectively divided theologians, philosophers, legislators and general masses. The laws governing this delicate sphere of the woman's autonomy reflect immensely on the plight of women in society and encompasses emotive and poignant sets of views, making it a mammoth task for the legislators to ensure that the constitutional mandate of equality and liberty are adhered to and the constitutional spirit is kept alive."[10]

In *Nand Kishore Sharma* v. *Union of India*,[11] the petitioner challenged the validity of the Medical Termination of Pregnancy Act, 1971 as being violative of Article 21 of the Constitution of India. The Court while dismissing the petition observed certain things which need to be drawn attention to while considering the case of child rape victims. The Court said:

> "It would appear that the dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury towards physical and mental health or prevent the possible deformities in the child to be born."

The Court further observed that "the object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear that the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinions that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy."

Considering the interest of child rape victims in light of Article 21, it is important to consider the abortion of such child in order to make her life dignified and allow her to enjoy personal liberty. The duty is on the Government to come out with specific guidelines to save the rights of child rape victims in cases of abortion of late-term pregnancy.

III. PROVISIONS UNDER THE INDIAN PENAL CODE, 1860

There was no specific abortion law in India until the Medical Termination of Pregnancy Act, 1971(MTP Act) was enacted, which made Section 312 of the Indian Penal Code (IPC) subservient. The idea of not allowing abortion of a child stems from the religious, moral and cultural sensibilities that influence the minds of the people.[12] The IPC in its Sections 312 to 316 provides punishments for causing miscarriage under different circumstances. Section 312 provides for voluntary causing miscarriage of a woman with child. It provides a punishment that can be extended to three years or with fine or with both. It enhances the punishment to seven years' imprisonment and also fine when the woman was quick with child. The said section did not even spare the woman who herself caused miscarriage from being guilty. The only exception provided was a miscarriage which was caused in good faith for the purpose of saving the life of the woman. This led to an increase

[9]Bhavish Gupta & Meenu Gupta, "The Socio-Cultural Aspect of Abortion in India: Law, Ethics and Practice", *ILI Law Review* (Winter Issue, 2016).
[10]As cited in *Ashaben Patel* v. *State of Gujarat*, 2015 (4) Crimes1 (Guj.).
[11]AIR 2006 Raj 166.
[12]K.D.Gaur, "Abortion and the Law in India", 15 *Cochin University Law Review* 123-153 (1991).

in illegal and unsafe abortions. The 1960s and 1970s saw liberalization of abortion laws across Europe and America which continued in many other parts of the world. It also had an effect in India owing to high maternal mortality rates due to unsafe abortions.[13] Even though Sections 312 and 316 provided for punishments for causing miscarriage under different circumstances, it has a good faith clause which made the causing of miscarriage as legal.

IV. THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

The attempts to liberalise the strict law on abortion in India were initiated as early as in 1964 with the constitution of Shri Shantilal Shah Committee based upon the recommendations of Central Family Planning Board. The Board reported an increase of illegal abortions being conducted in unhygienic conditions by untrained persons affecting the life and health of women.[14] The Shah Committee carried out a comprehensive review of socio-cultural, legal and medical aspects of abortions. The Committee recommended that the existing IPC was too restricted and that it should be liberalised. It pointed out that legalising abortion to prevent wastage of women's health and lives on both compassionate and medical grounds. The Committee suggested various situations justifying termination of pregnancy under law. It was of the view that this should be allowed not for saving the life of the pregnant woman, but also to avoid grave injury to her physical or mental health. The MTP Act was eventually passed which came into operation on 1 April 1972 after the government framed rules for its implementation as required under the Act. The basic objectives of the Act are:

(i) "Health measures, when there is danger to the life or risk to physical or mental health of the woman.
(ii) Humanitarian grounds, such as when pregnancy is caused as a result of a sex crime or intercourse with a lunatic woman etc.
(iii) Eugenic grounds, when there is a substantial risk that the child, if born, would suffer from deformities and disease."

The Act having only eight sections provides for circumstances wherein carrying abortions are legal and also provides for requirements of health service providers who can carry out abortions and a place where abortions can be carried. It has no specific provisions relating to the victims of child rape and hence child rape victims whose pregnancy has to be aborted are covered under the said Act.

The law is clear when the abortion is to be carried within 20 weeks of pregnancy. The MTP Act, 1971 in its Section 3(2) provides that "a pregnancy may be terminated by a registered medical practitioner, —

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith that-
    (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or if grave injury to her physical or mental health; or

[13]Siddhivinayak S. Hirve, "Abortion Law, Policy and Services in India: A Critical Review; Reproductive Health Matters", 12(24) *Supplement: Abortion Law, Policy and Practice in Transition* 114-121 (Nov, 2004).
[14]SF Jalnawalla, "Medical Termination of Pregnancy Act: A Preliminary Report of the First Twenty months of implementation", 25(2) *Journal of Obstetrics and Gynaecology in India* 588-92 (1974).

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped."

Explanation I to Section 3 provides that "where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman."

Further, Section 4 provides the place where pregnancy can be terminated. Most important is an exception of Section 3(2) which is carved out in Section 5(1) which provides that "the provisions of Section 4, and so much of the provisions of sub-section (2) of Section 3 as related to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."[15]

> Certainly, Section 5(1) can be very much made applicable to cases when a pregnant woman's life is in immediate danger. However, applying section 5(1) in cases where the life of the pregnant woman is not in immediate danger, it seems to be juxta positioned with Section 3(2). Section 3(2) mandates the opinion of two medical practitioners for termination of pregnancy where the length of pregnancy is between 12 to 20 weeks. Conversely, the opinion of even one medical practitioner is sufficient for pregnancies beyond 20 weeks in cases of application of Section 5(1).

The Gujarat High Court took a restrictive view in interpreting Section 5 of MTP Act in the case of *Ashaben* v. *State of Gujarat*,[16] wherein the victim was held captive before she could seek termination. On approaching the High Court over 24-week pregnancy, the Court observed that:

> "Undoubtedly, Section 5 of the Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression 'good faith' discloses that the opinion has to be based on the necessary examination required to form such an opinion."

In the case of *Chandrakanta Jayantilal Suthar* v. *State of Gujarat*,[17] the Court denied the abortion to child rape victim who was in her 24th week of pregnancy. The case was later on overruled by the Hon'ble Supreme Court. The decision in the case was given upholding *Ashaben's case*. The Court held that:

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[15] Sec. 5(1): The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

[16] 2015 (4) Crimes1 (Guj.).

[17] SLP (Crl.) No. 6013 of 2015.

> "there are times when a poignant situation arises in a case where the application of the law gives rise to a situation that would have physical, mental and social connotations upon the life of an innocent girl. Nevertheless, the law is the law, and has to be obeyed. If the provision of the statute is unambiguous and the legislative intent is clear from it, no other rules of interpretation are required to be resorted to and the statutory provision is to be followed as it is."

The verdict in the abovementioned case can very well be applicable on adult women who normally do not face any immediate danger to their lives. But it would be dangerous to apply in cases of child rape victims. Child rape victims are in a dangerous situation from both the fronts i.e. whether they deliver a baby or abort. It is also noteworthy that a child may not have the required strength to bear the burden of pregnancy. The pelvic bones in the tender years are not developed enough to support pregnancy and to give passage to baby during delivery. Further, there are complications involved in teenage pregnancies and abortions which need to be weighed.[18] In light of this, it is desirable to interpret Section 5(1) and cover the cases of abortion of late-term pregnancy. [19]

In *R and Anr.* v. *Stateof Haryana,*[20] the Court pointed out that "some abortions are necessary beyond the statutory limit in the light of circumstances under which they are sought and, therefore, streamlining of the system in this regard is required. The MTP Act is an inadequate Act and only appears to have been designed to serve the interest of the family planning programme. Under the MTP Act, women have restricted right to termination of pregnancy. The declared objects of the MTP Act are to help women, who become pregnant as a result of rape, women who are pregnant due to contraceptive failure (applicable to married women/marital sexuality) or to reduce the risk of severely handicapped children being born." The Court allowed the termination of pregnancy of a child rape victim applying the 'best interest test' as explained by the Hon'ble Supreme Court in *Suchita Srivastava's case*.[21]

In the case of *King* v. *Broune,*[22] it was held that "when a doctor on reasonable grounds and with adequate knowledge in the field comes to a conclusion of probable consequences of pregnancy that it will make the concerned victim/woman physically and mentally wrecked then the concerned doctor/doctors, if they decide for termination of pregnancy, are proceeding with purpose of preserving the life of the woman. On the anvil of the settled position of law, the best interest parameters and the social circumstances that may be faced by the rape victim, the decisions of Court as well as of the doctors should be guided by the interest of the victim alone."[23]

In *Bashir Khan* v. *State of Punjab,*[24] it was held that "to ensure that the victim of rape who becomes pregnant does not lose time by applying from court to court, there shall be general instructions given by the Director General of Police to all the police stations who

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[18] Mukesh Yadav, "Is There Need for Danger to Health (Physical/Mental)/Life Ground of MTP beyond Permissible Limit in Exceptional Cases?", 37(4) *J. Indian Acad Forensic Med. October-December* 334-337 (2015).

[19] In an interview to *The Hindu*, senior advocate Indira Jaising said that doctors are not providing timely interventions for child rape victims despite being armed with the powers under Section 5. The doctors "just wash their hands off the case", she said. "That's why victims of rape – children – come to court. This tragic situation boils down to the failure of the medical profession." The Hindu, August 25, 2017

[20] *Supra* note 8.

[21] *Supra* note 7.

[22] [1938] 3 All ER 615.

[23] *Supra* note 20.

[24] Civil Writ Petition No.14058 of 2014 (Decided on 02.08.2014).

register cases of rape and who come by information that the victim has become pregnant to render all assistance to secure appropriate medical opinions and also provide assistance for admission in government hospitals and render medical assistance as a measure of support to the traumatised victim. The need to apply to the court for permission would arise only in a situation where there is a conflict of whether the pregnancy must be terminated or not or when the opinions of two medical practitioners themselves differ. It is hardly necessary in a situation where there is no contest and the victim gives her own consent and the guardian also gives consent and there is proof that such pregnancy was a result of rape. This instruction shall also be circulated to all the Station Inspectors manning police stations in the State of Punjab."

The Medical Termination of Pregnancy Act in India was amended in 2003 to facilitate better implementation and increase access for women, especially in the private health sector. The Act allows abortion up to 20 weeks of pregnancy and hence women seeking abortions after 20 weeks' time period are required to obtain permission from the courts. Attempts have been made to amend the Act by way of a Bill which was introduced in 2014 to increase the period of 20 weeks to 24 weeks, but the same has not been passed owing to a strong opposition from the medical community as it also had other provisions which allowed nurses and non-allopathic doctors to conduct abortions.[25]

V. PREVENTIVE MEASURES UNDER CRIMINAL LAW AMENDMENT ACT, 2013 AND THE POCSO ACT

The newly added provisions in the Code of Criminal Procedure, 1973 vide Criminal Law (Amendment) Act, 2013 in its Section 357C provides for the treatment of rape victims. It obligates all hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, to immediately, provide the first-aid or medical treatment, free of cost, to rape victims. Also Section 166B has been added to the IPC which provides that "whoever, being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of section 357C of the Code of Criminal Procedure, 1973, shall be punished with imprisonment for a term which may extend to one year or with fine or with both." However, whether this immediate medical treatment can cover the issue of pregnancy of child rape victims is a matter of interpretation.

If a case of child rape is registered within the 20 weeks' time frame as provided by the MTP Act, the issue of abortion does not arise. Unfortunately, in India, the rape crimes are underreported and unreported due to various reasons which include social taboos. Also child rape victims many a times do not understand the nature of crime being committed on them and are unaware of the consequences. The issue of late term abortions emerges only after a period of 20 weeks where the child complaints of health disorders or where the pregnancy bulge is seen. Also as children and adolescents have less access to reproductive health information and services compared to older married counterparts, they are more likely to delay recognising pregnancy, to delay obtaining care, and to access care from unsafe providers.[26] Furthermore, doctors deter to abort late-term pregnancies of child rape victims in

[25]Shweta Krishnan, "MTP Amendment Bill 2014: Towards Re-imagining Abortion Care", 12(1) *Indian Journal of Medical Ethics* 43-46 (January-March 2015). Also see, Dr. K.K. Agarwal, "MTP Amendment Bill, 2014: A Retrograde Step by the Ministry of Health", 25(6) *Indian Journal of Clinical Practice* 506-507 (November 2014). See, Phanjoubam M., "Proposed amendments in the Medical Termination of Pregnancy Act in a nutshell", 31(1) *J Med Soc* 1-2(2017).

[26]Jejeebhoy, Shireen J., "Adolescent Sexual and Reproductive Behavior: A Review of the Evidence from India: ICRW' and Mathai, Saramma, "Review of Incomplete and Septic Abortions in India with Particular Reference

order to avoid legal complications.[27]

Rule 5 of the Protection of Children from Sexual Offences Rules, 2012 envisage that "whenever a police officer comes to know about the commission of an offence on a child, he/she is required to arrange to take such child to the nearest hospital or medical care facility centre for emergency medical care. And the registered medical practitioner rendering emergency medical care shall attend to the needs of the child, which includes possible pregnancy and emergency contraceptives to be discussed with the pubertal child and her parent or any other person in whom the child has trust and confidence."

The aforementioned provisions have been included vide the 2013 amendments in Criminal Laws as a preventive measure to be taken and to ensure that the rape on a girl child does not result into pregnancy. It is significant to note that the said provision should be strictly adhered to while dealing with the cases of child rape victims.

As and when the Court is approached for the permission to seek an abortion, the Courts rely on the advice of the medical boards appointed to examine the girl child. The opinion of the medical board plays an important role in the decision of the case.

VI. CONCERNS OVER LATE-TERM ABORTIONS OF CHILD RAPE VICTIMS

On critically analysing the aforementioned provisions, the following legal questions do emerge for providing justice to those child rape victims who become pregnant and who could not abort the child within the 20 weeks' legal time frame:

1. Can't medical practitioners immediately carry out late-term abortions of child rape victims under Section 5(1) considering it as immediately necessary to save the life of the pregnant girl?
2. Is it feasible, affordable and accessible for every child rape victim to approach the Supreme Court/High Court for late-term abortions?
3. Can't the law be made flexible enough to allow abortions, even if it is not life threatening, to abort after a period of 20 weeks?
4. Can't there be any other machinery in place other than the Courts to seek immediate relief from the burdensome pregnancy?
5. Can't government set up special Medical Boards consisting of medical and legal experts in each district to refer such cases for immediate disposal?
6. Can't a duty be imposed on Medical Practitioner to immediately refer cases to such special Medical Boards for prompt action?
7. Can't a panel of medical practitioners having expertise be formed in each district or group of districts to perform complicated late-term abortions of child rape victims?
8. Can't abortion be interpreted to mean immediate medical treatment as per Section 357C of the Cr.P.C?
9. Won't the present time consuming, expensive and inaccessible procedure of approaching the higher judiciary lead to an increase in illegal abortions?[28]

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to West Bengali: Department for International Development "as cited in Heidi Bart Johnston, "Abortion Practice in India: A Review of Literature", *available at*: http://www.commonhealth.in/safe_abortion/308.pdf (last visited on Nov. 30, 2018).

[27] Sec. 8 of MTP provides that no suit or other legal proceeding shall lie against any registered medical practitioner or any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act. The section is often ignored from reading!

[28] *Supra* note 26.

10. Can’t the good faith clause be made applicable while performing late term abortion of child rape victims?
11. Isn't it necessary that the law which is now almost five decades old be revisited in light of medical developments?
12. Doesn’t the issue of late-term abortion, especially of child rape victims, need urgent attention of the Government?

The challenge, experts say, is that there are no legal guidelines under the MTP Act for doctors or courts to follow when deciding on abortion after 20 weeks.

CRIMINALIZATION OF MARITAL RAPE: WHETHER A STEP TOWARDS PROMOTION OR PROHIBITION OF CHILD MARRIAGE?

Mamta Rana[*]

I. INTRODUCTION

Indian society believes in morals, values, beliefs, rituals and considers the institution of marriage as a sacrament. Marriage is a union of two hearts. Success of married life depends on the edifice built with the mutual trust, understanding, love, affection, service and self-sacrifice. Once this edifice is shaken, happy married life will be shattered into pieces. This result is one of misery and emotion. When it is impossible to live like husband and wife, any compulsion to unite them will lead to social evil and disturbance of mental peace and disorder in the family life. However rigid the social fabric, it is not the social system but the personal safety of the parties to the wedlock shall prevail. [1]Child marriage in India has been practiced for centuries, with the fact that children were forced to get married before they attain physical and mental maturity. Children at this tender age were not in a position to discern what is wrong and what is right for them. The problem of child marriage in India has innumerable reasons be it taboos in the society, prejudices, socio-economic factors or protection from invaders. Various social movements which sprung up during the time of British rule in India tried to eradicate various social practices e.g., dowry, sati including child marriage. The British enacted laws to prohibit such social practices and hence enacted various social welfare legislations

II. LAWS PERTAINING TO THE STATUS OF CHILD MARRIAGE IN INDIA

The Child Marriage Restraint Act, 1929 was enacted during the British regime. The main aim of the legislation was to prevent and prohibit child marriages in India. This Act was applicable to all the communities but act did not govern the validity of child marriage as the personal laws of the contracting parties governed it. This Act provided for the penalty imposed on the persons in violation of the provisions of the said legislation.[2] The Supreme

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1.*Roopa Reddy* v. *Prabhakar Reddy*, AIR 1994 Kar. 12.

2.Sec. 3of the Child Marriage Restraint Act, 1929."Punishment for male adult below twenty-one years of age marrying a child. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with simple imprisonment, which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both."

Sec. 4 of the Child Marriage Restraint Act,1929. "Punishment for male adult above twenty-one years of age marrying a child. Whoever, being a male above twenty-one years of age, contracts a child marriage shall be punishable with simple imprisonment, which may extend to three months and shall also be liable to fine."

Sec. 5 of the Child Marriage Restraint Act,1929. Punishment for solemnizing a child marriage. "(1) Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage."

Sec. 6 of the Child Marriage Restraint Act, 1929."Punishment for parent or guardian concerned in a child marriage. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to three months and shall also be liable to fine. Provided that no woman shall be punishable with imprisonment. (2) For the purposes of this section, it shall be presumed, unless and

Court in *Lila Gupta* v. *Laxmi Narain*[3] held that, "a reference to the Child Marriage Restraint Act, 1929 would show that it was enacted to carry forward the reformist movement of prohibiting child marriages and, while it made a marriage in contravention of the provisions of that Act punishable, it did not render the marriage void." The Act has been repealed and replaced by the present legislation *i.e.*, the Prohibition of Child Marriage Act, 2006. The stated legislation declares child marriage as voidable[4] marriage at the instance of the contracting parties and provides for punishment and fine[5] for the same.

As per Hindu personal law, age of the parties is one of the essentials of Hindu Marriage laid down under section 5[6] of the Hindu Marriage Act, 1955 but violation of this essential condition does not render child marriage void under section 11[7] or voidable under

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until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized."

[3] (1978)3SCC258.

[4] Sec. 3 of the Prohibition of Child Marriage Act, 2006. "Child marriages to be voidable at the option of contracting party being a child. — (1) Every child marriage, whether solemnized before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage. (2) If at the time of filing a petition, the petitioner is a minor, the petition may be filed through his or her guardian or next friend along with the Child Marriage Prohibition Officer. (3) The petition under this section may be filed at any time but before the child filing the petition completes two years of attaining majority. (4) While granting a decree of nullity under this section, the district court shall make an order directing both the parties to the marriage and their parents or their guardians to return to the other party, his or her parents or guardian, as the case may be, the money, valuables, ornaments and other gifts received on the occasion of the marriage by them from the other side, or an amount equal to the value of such valuables, ornaments, other gifts and money: Provided that no order under this section shall be passed unless the concerned parties have been given notices to appear before the district court and show cause why such order should not be passed."

[5] *Id.* at sec. 9. "Punishment for male adult marrying a child. Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both."

Sec 10."Punishment for solemnizing a child marriage Prohibition of Child Marriage Act,2006: —Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage."

Sec. 11. Prohibition of Child Marriage Act,2006: "Punishment for promoting or permitting solemnization of child marriages.—(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or 3 any other person or in any other capacity, lawful or unlawful, including any member of an organization or association of persons who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment. (2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnized."

[6] Sec. 5 of the Hindu Marriage Act, 1955. "Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage; (ii) at the time of the marriage, neither party,- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or (b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or (c) has been subject to recurrent attacks of insanity or epilepsy; (iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage; (iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two."

[7] *Id.* at sec. 11. Nullity of marriage and divorce- Void marriages. - Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of sec. 5.

section 12[8] of the Hindu Marriage Act, 1955. Moreover, under section 13(2) of the same law, option of puberty is provided as a special ground of divorce to a female.[9] To exercise the special ground, her marriage has to be solemnized when she was below 15 years and on attainment of 15 years until the age of majority *i.e.*, 18 years, she has a right to repudiate the marriage.

A husband's petition for annulment of marriage was dismissed on the ground that he was under age at the time of marriage in *V. Mallikarjunaiah* v. *H.C. Gowramma*[10], an underage marriage as a ground of void, voidable and dissolution of marriage is nowhere mentioned in section 11, 12 and 13 of the Hindu Marriage Act, 1955. It would be harsh on the part of the court if it would declare child marriage as void marriage because in such case the parties would face the grave consequences, having no fault of theirs.

Similarly under section 2(vii)[11]of the Dissolution of Muslim Marriage Act, 1939 matrimonial relief can be availed by a minor wife, thus the Muslim law also recognizes child marriages. Not only Hindu personal law, but Muslim personal law also provides for child marriage, as the age of marriage is the age of puberty. The probable reason why no change has been brought under Hindu personal law till now is because child marriage is still practised in the society and no unwanted stigma to be fetched on the status of the contracting parties to the marriage and moreover child born should not be unnecessarily harassed by declaring the status of marriage as void or voidable and calling child as an illegitimate child. Where family or personal laws, especially both Hindu as well as Mohammedan laws, provide for child marriage, there is little that law can change. The doctrine of *'factum valet'* has also been applied to such marriages by the courts which means that 'a fact cannot be altered by hundred texts.' In essence this means that the marriage solemnized in contravention of age requirement is itself valid inviting only penal consequences. The Prohibition of Child

[8]*Id.* at sec. 12." Voidable Marriages.-(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:- (a) that the marriage has not been consummated owing to the impotency of the respondent; or (b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or (d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner. (2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage- (a) on the ground specified in clause (c) of sub-section (1) shall be entertained if- (i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered ; or (ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered; (b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfied- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged; (ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground."

[9]*Id.* at sec. 13(2). "A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground- (iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years."

[10] AIR 1997 Kar. 77.

[11] Sec. 2of the Dissolution of Muslim Marriage Act, 1939. "Grounds for decree for dissolution of marriage. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: a woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds: that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years Provided that the marriage has not been consummated."

Marriage Act, 2006, which seeks to prohibit the solemnization of child marriage, seems like the only weapon in the arsenal to protect the minor. It is only section 24[12] of the Special Marriage Act, 1954 that renders a child marriage a void marriage.

III. CHILD MARRIAGE *VIS-À-VIS* MARITAL RAPE

Marital rape is a grey area and it has not been defined under any legislation. It is a sexual intercourse done by husband with his own spouse that too without her consent and it can also be termed as physical or domestic violence against spouse. The 'consent' of wife here is based on colonial law of crime. In *R.* v. *R.*,[13] the House of Lords widened the scope of criminal liability by declaring that a husband could be charged as the principal offender in the rape of his wife. This decision seems to have obliterated the protection of the husband from such prosecution under the doctrine of marital exemption. This exemption was based on the belief under which wife was regarded as chattel. She was supposed to have given her consent to her husband as natural implication of the marriage. This has become an outmoded view of marriage. The concept of marital rape has undergone a radical change in U.K. and it has been declared an offence.

Section 375(6) of the Indian Penal Code (IPC) states that a man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman with or without her consent, when she is under eighteen years of age. However, exception 2 to section 375 IPC[14]states that "sexual intercourse by man with his and wife not being less than 15 years of age … ." This seems like an indirect way to somehow protect the institution of child marriage. There is societal stigma as well as acceptance regarding the same. An exception to Section 375 in the IPC does not find a man guilty to having sexual intercourse with his 15-year-old wife. Although there are other laws as well, which provide for the protection of minors such as The Protection of Children from Sexual Offences (POCSO) Act of 2012, which defines 'children' as those aged below 18 years. It has specific provisions declaring that 'penetrative sexual assault' and 'aggravated penetrative sexual assault' against children below 18 is rape. The Protection of Women from Domestic Violence Act, 2005, which seeks to punish sexual abuse by husband, also offers remedy for aggrieved wives (whether minor or adult). There is a gross human rights violation as there is a distinction between a girl who is married and the one who is not. Protection against sexual offences has been given to an unmarried girl less than 18 years under all the above stated legislation but when it comes to protection to a married girl against sexual act against her that too by her husband has not been declared an offence (Marital Rape). After the Criminal Laws Amendment Act, 2013, the age of consent by a girl for sexual intercourse has increased from 16 to 18 but for a married girl it is still 15. The distinction made between married and

[12]Sec. 24of the Special Marriage Act, 1954. Void marriages. "(1) Any marriage solemnized under this Act shall be null and void (and may, on a petition presented by either party thereto against the other party, be so declared) by a decree of nullity if- (i) any of the conditions specified in Cls.(a),(b), (c) and (d) of Sec. 4 has not been fulfilled : or (ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under the Act within the meaning of Sec. 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in Cls. (a) to (e) of Sec. 15. Provided that no such declaration shall be made in any case where an appeal has been preferred under Sec.17 and the decision of the District Court has become final."

[13] (1992) I AC 599.

[14]Exception to sec. 375 IPC, "sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape".

unmarried girl is violative of fundamental rights of citizens enshrined under Article 14[15] , 15[16] and21[17] of the Indian Constitution.

In the case of *Independent Thought* v. *Union of India,*[18] a two judge Bench of the Supreme Court held that sexual intercourse with minor (below 18 years) wife is rape. Public Interest Litigation was filed that had challenged the validity of exception 2 to section 375.

Following are the major five observations in this case:

1. Supreme Court said the exception in the rape law was contrary to the philosophy of other statutes and violated the bodily integrity of a girl child. The two-judge bench also expressed concern over the prevalent practice of child marriage in India and said social justice laws were not implemented with the spirit with which they have been enacted by Parliament.
2. The Supreme Court clarified that it has not dealt with the issue of marital rape as it was not raised by respective parties.
3. Justice Gupta wrote a separate but concurrent verdict. He said the age of marriage was 18 in all laws and the exception given in the rape law under the IPC is "capricious, arbitrary and violates the rights of a girl child.
4. SC also said the exception violated Article 14, 15 and 21 of the Constitution.
5. To prevent child marriage across the country, SC asked Centre and states to take proactive steps. It also voiced concerns over thousands of minor girls being married in mass wedding ceremonies on the occasion of akshaya tritiya.

IV. CONCLUSION

By having a law, which was the result of colonial system and which allowed husband to have sexual intercourse with his minor wife, is against the provisions of Indian Constitution, and in contradiction of the provisions of International Convention on the Rights of Child and this is still the part of the IPC. We are in a state of dilemma that are we looking forward or looking back. These issues are not at bothering judiciary but judiciary is very active when it comes to the protection and preservation of institution of marriage but not concerned about the human rights violation of the child under the Indian Constitution. On the other hand, Parliament the issue of marital rape was debated and discussed several times but no substantive changes have been brought. Judiciary has also shifted the responsibility on the Parliament. We have laws relating to the prohibition of child marriage but child marriages are still being performed in several parts of India. The Apex Court has left completely the interpretation of the word "consent "which was the main issue in the writ petition. The impact

[15]Art. 14 of the Constitution of India. Equality before law. "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth."

[16]Art. 15 of the Constitution of India, "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and palaces of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of the state funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children (4) Nothing in this article or in clause (2) of art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."

[17]Art. 21 of the Constitution of India, "No person shall be deprived of his life or personal liberty except according to a procedure established by law."

[18]Writ Petition (Civil) No. 382 of 2013.

of the judgment for those who are in child marriage will be to immediately live separately until the girl reaches the age of 18. This judgment directly exposes the husband to criminal prosecution for rape even if the wife of child marriage has given consent for sexual intercourse. The need of the hour is to relook the colonial laws in the pretext of the contemporary and prevailing circumstances in the society

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ADMISSIBILITY OF ELECTRONIC RECORDS AS SECONDARY EVIDENCE UNDER SECTION 65B OF THE INDIAN EVIDENCE ACT: RECENT JUDICIALAPPROACHES

*Deepa Kharb**

I. INTRODUCTION

With the intention to modernize the evidentiary practices and enable courts in India to deal with the advances in technology, the Indian Evidence Act, 1872(hereinafter 'IEA') was amended by virtue of section 92 of the Information Technology Act, 2000(hereinafter 'IT Act'). Accordingly, sections 3 and 59 were amended and sections 65A and 65B were inserted to incorporate the admissibility of electronic evidence.[1] Any information, be a text, photograph or phone logs, created and stored inside the device is an electronic record as per section 2(t) of the IT Act[2] and is a "document" under section 3 of the IEA and therefore admissible before a court as an electronic evidence. Further, according to section 59, electronic evidence can be proved by documentary evidence only-whether primary or secondary (section 61) and not by oral evidence.[3]

In most of the cases, the computer or digital camera (used for creating or storing electronic data) itself is not produced before the court as evidence, either a printout is taken or CDs/ DVDs are prepared to be produced as secondary evidence before the court in place of primary evidence. Thereafter, as per sections 65A and 65B, the functionality of such computer needs to be established and the person who has transferred these photographs and produced them needs to certify.[4] Further, under sections 61 to 65, the word "document or content of documents" have not been replaced by the word "electronic documents or content of electronic documents", making the intention of the legislature to be explicitly clear i.e. not to extend the applicability of section 61 to 65 to the electronic record.[5]

In view of this scenario, any documentary evidence by way of an electronic record under the IEA can be proved only in accordance with the procedure prescribed under section

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[1]Amendment Act 21 of 2000, s. 92 and the Second Schedule: s. 3"all documents produced for the inspection of the Court" was substituted by "all documents including electronic records produced for the inspection of the Court"; in sec. 59, phrase "content of documents" was substituted by "content of documents or electronic records". See also, Neeraj Arora, "Admissibility of Electronic Evidence: Challenges for Legal Fraternity", *available at*:http://www.neerajaarora.com/admissibility-of-electronic-evidence-challenges-for-legal-fraternity/ (last visited on October 20,2018)

[2] S. 2(1)(t), the Information Technology Act, 2000: "Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

[3] Under s. 22A, however, it was provided that oral evidence with respect to contents of electronic records is relevant only when genuineness of the record is in question; also s. 45A was inserted in the IEA, which provides that opinion of Examiner of Electronic Evidence will be relevant fact when the Court has to form an opinion on any matter relating to information in electronic form; See also, Kumar Askand Pandey, "Appreciation of Electronic Evidence: A Critique of Judicial Approach", 6 *RMLNLUJ* 24 (2014), *available at: https://www.scconline.com/Members/SearchResult2014.aspx* (last visited on Oct. 23, 2018).

[4]*Ibid.*

[5]*Ibid.*

65B.[6] Therefore, a person, who was responsible in handling of the computer or digital camera and who took the print out or photograph and transferred it to the media, needs to certify that how the printout or storage was done and the functionality requirements under section 65 B (2) was complied with.[7]

Section 65B(4)[8] lists additional non-technical qualifying conditions to establish the authenticity of electronic evidence requiring the production of a certificate by a person occupying a responsible official position and was responsible for the computer on which the electronic record was created, or is stored. Therefore, the issuer of the certificate must identify the original electronic record, describe the manner of its creation, describe the device that created it and certify compliance with the conditions of section 64B(2) and 64B(4). Sections 59-65 including section 64A and section 65B therefore, was to provide a complete code on conditions of admissibility of electronic record.[9]

However, despite the good intentions behind this amendment, the provision has been controversial, primarily because different High Courts have treated electronic evidence under section 65B inconsistently and arbitrarily.[10] Different courts have been demanding different methods for the fulfilment of the conditions laid down in section65B therefore, there has been no uniformity. This variation in practice not only causes grave inconvenience to the litigants, but also facilitates possibilities for the derailment of justice.

II. REQUIREMENT OF CERTIFICATE UNDER SECTION 65B-CERTIFICATE OR NO CERTIFICATE: DIFFERENT INTERPRETATIONS BY DIFFERENT COURTS

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[6] E-Pathshala module on Digital Evidence- Broad Principles, *available at:* http://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/07._information_and_communication_technology_/10._digital_evidence-broad_principle/et/7566_et_10_et.pdf (last visited on Oct. 18, 2018)

[7] Aratrika Chakraborty and Anuradha Parihar, "A Techno Legal Analysis of Admissibility of Digital Photographs as Evidence & Challenges", 13 *International Journal of Law* 3 (2017). "S. 65B (2) gives the technical conditions for admissibility. (2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -
a. the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
b. during the said period, information of the kind contained in the electronic record or of the
kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
c. throughout the materiel part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and
the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities."

[8] *Id.* at s. 65 B(4) –"In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,-
a. identifying the electronic record containing the statement and describing the manner in which it was produced;
b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
c. dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it."

[9] *Supra* n. 6.

[10] Aradhya Sethia, "Where do we stand on 'secondary electronic evidence?", *available at*: https://spicyip.com/2014/10/guest-post-where-do-we-stand-on-secondary-electronic-evidence.html (last visited on Oct. 21, 2018).

The dispute regarding whether a certificate under section 64B is mandatory or not and whether it is the only way one may satisfy the conditions under this section has long been the bone of contention. The test for admissibility under section 65B was considered for the first time in 2003 in *State* v. *Mohd. Afzal*[11] wherein the Division Bench of the Delhi High Court was called upon to determine whether the call records in evidence had been admitted in accordance with section65B. It was contended by the appellant-accused that CDRs (call detail records) were inadmissible as the certificate as per section 65B (4) was not submitted by prosecution. This contention was rebutted by the prosecution on the grounds that the conditions under section 65B (2) had been met through oral testimony. The Delhi High Court accepted the argument of the prosecution and noted that, "the certificate under section65B (4) was merely an alternative mode of proof and compliance with section (1) and (2) of section 65B is sufficient to make admissible and prove electronic records."[12] "Comparing computer output under section 65B to secondary documentary evidence under section 65(d), the Court held that the oral evidence was equally sufficient and the lack of certificate was not an automatic bar."[13]

State (NCT of Delhi) v. *Navjot Sandhu alias Afsan Guru*,[14] where the entire conspiracy theory was based on the intercepted call records of the accused persons, accused submitted that no reliance could be placed on the mobile telephone call records as no certificate under section 65B (4) was produced by the prosecution. The two judges bench of the Supreme Court held that "call records of cellular phones are admissible in evidence under section 7 of the IEA and there is no specific bar against the admissibility of the call records of telephones or mobiles." Further the court held that secondary evidence of such calls can be led under sections 63 and 65 of the IEA:

> "Irrespective of the compliance with the requirements of Section 65B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub section (4) of section 65B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, sections 63 and 65."[15]

After this decision, admissibility of electronic evidence depended on judicial discretion. Some High Courts continued to demand for certificates, others based it on oral testimony or applying alternate ways for establishing admissibility of electronic records.[16] In *R.K Anand* v. *Delhi High Court*,[17] the Supreme Court was considering the admissibility of recordings on some microchips and CDs. It was a case where the microchip was preserved by a popular TV channel studio and the court believed that it could not have been tampered with and therefore, the authenticity of the CDs could be relied upon.

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[11]*State* v. *Mohd. Afzal* (2003) 107 DLT 385.
[12]*Ibid.*
[13]Ashwini Vaidialingam, "Authenticating Electronic Evidence: S. 65B, Indian Evidence Act, 1872", 8(1&2) *NUJS Law Review* 43(2015).
[14]*State (NCT of Delhi)* v. *Navjot Sandhu* (2005) 11 SCC 600.
[15]*Id.* at 715, *available at:* https://www.scconline.com/Members/SearchResult2014.aspx.(last visited on Oct. 22, 2018).
[16]*Societe Des Products Nestle SA* v. *Essar Industries* (2006) 33 PTC 469 (Del).
[17](2009) 8SCC 106.

After a series of conflicting judgments given by various High Courts and trial courts, a three judges bench of the Supreme Court in *Anwar P.V. case*[18] overruled the *Navjot case*[19] and settled the law on the admissibility of electronic evidence. Placing reliance on the *non obstante clause* in section 65B of the IEA, the Court held that the special provisions under sections 65A and 65B will prevail over the general law on secondary evidence under sections 63 and 65 of the IEA.[20] Therefore, for an electronic record to be admissible as secondary evidence in the absence of the primary, the mandatory requirement of section 65B certification is required to be complied with. The Supreme Court categorically held that the IEA does not contemplate or permit the proof of an electronic record by oral evidence if requirements under section 65B of the IEA are not complied with, as the law now stands in India.

"Proof of electronic record is a special provision introduced by the IT Act amending various provisions under the Evidence Act IEA. The very caption of section 65A of the Evidence Act IEA, read with sections 59 and 65B is sufficient to hold that the special provisions on evidence relating to electronic record shall be governed by the procedure prescribed under section 65B of the IEA that is a complete Code in itself. Being a special law, the general law on secondary evidence under section 63 read with section 65 of the IEA has to yield."[21] *Generalia specialibus non derogant*, special law will always prevail over the general law. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record.[22]

In 2014 and 2015, judges of the different High Courts and trial courts placed vehement reliance upon the ratio of the *Anwar* judgment in matters related to admissibility of electronic evidence. The Bombay High Court in *Balasaheb Gurling Todkari* v. *State of Maharashtra*[23] held that "the CDRs cannot be admitted in evidence in the absence of the requisite certificate as per section 65B." Similarly, in the case of *Faim* v. *State of Maharashtra*,[24] the Bombay High Court held that "it was mandatory for the prosecuting agency to produce the certificate in terms of section 65B obtained at the time of collecting document(CDR)."

Similarly, in *Jagdeo Singh* v. *State*,[25] quoting *Anvar*,[26] the Delhi High Court was satisfied that "the intercepted telephone calls presented in the form of CDs before the trial court which were then examined by the forensic expert did not satisfy the requirements of section 65B of the IEA and cannot be looked into by the Court for any purpose whatsoever."[27]

The importance of role played by sections 65A and 65B of the IEA with regard to the admissibility of electronic records was reiterated by the Supreme Court in *Harpal Singh @ Chhota* v. *State of Punjab*.[28] The prosecution in this criminal appeal produced printed copies of relevant records but failed to adduce a certificate as required under section 65-B (4) of the Act. The High Court dismissed the plea of inadmissibility of such call details by observing

[18] *Anwar* v. *Basheer* (2014) 10 SCC 473.
[19] *Supra* note 14.
[20] *Ibid.*
[21] *Supra* n. 17 at para 19.
[22] *Id.* at para 22.
[23] 2015 SCC Online Bom. 3360.
[24] 2015 SCC Online Bom. 5842
[25] 2015 SCC Online Del 7229
[26] *Supra* n. 17.
[27] *Supra* n. 3.
[28] (2017) 1 SCC 734.

that all the stipulations contained under section 65 of the IEA had been complied with. However, the Supreme Court, going by the decision of this court in *Anvar P.V.*,[29] ordaining an inflexible adherence to the enjoinments of sections 65B(2) and (4) of the Act, refused to sustain the High Court's finding on the issue. The Court held that "where the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of section 65B (2) had been complied with, in absence of a certificate under section 65B (4), the secondary evidence has to be held inadmissible in evidence." However, upholding the sentence, the court added that the charges against the accused persons, including the appellants, stand proved beyond reasonable doubt, even without considering the call details.

Though the Supreme Court ruling in *Anwar* and above case has clearly and unequivocally stated that any electronic evidence in secondary form filed without meeting the requirements of section 65B(4) will be inadmissible, a two judge bench in *Sonu* v. *State of Haryana*[30] has expressed doubts over this principle. The bench noted that the law laid in *Anwar* judgment has not clarified whether the judgment is to be applied prospectively or retrospectively also. Since this question has been left open in *Anwar* decision, it will be used to reopen or challenge the admissibility of evidence in pending trials where the requirements under section 65B were not complied with according to the bench. The Court in *Sonu*[31] case held the requirements of section 65B to be relating to method of/mode of proof (objection to which cannot be raised at appellate stage) despite *Anwar* holding that non-compliance with section 65B strikes at the very admissibility of the evidence.[32]This decision by a two judge bench cannot overrule larger bench decision but these observations will definitely affect and delay all other pending trials and appeals across the country.[33]

Earlier too, in *Abdul Rahaman Kunji* v. *State of W.B.*[34], a Division Bench of the Calcutta High Court, while deciding the admissibility of e-mail, held that "an e-mail downloaded and printed from the e-mail account of the person can be proved by virtue of section 65B read with section 88A of the IEA. The oral testimony of the witness who had downloaded and printed the said mails is sufficient to prove the electronic communication even in absence of a certificate in terms of section 65 B of the IEA."[35]

The *Anwar* ruling was further diluted by its interim order in *Shafi Mohhammad* v. *State of Himachal Pradesh*[36] wherein it observed that that "a party, who is not in the possession of a device which has produced an electronic document, cannot be required to produce a certificate under section 65B of the IEA." The Court further held that the requirement of producing a certificate under section 65B can be relaxed in the interest of justice by the court.

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[29]*Supra* n. 17.
[30](2017) 8 SCC 570.
[31]*Ibid.*
[32] Anuj Beri, Sonali Malik, *et. al.*, "India: Supreme Court On Admissibility Of Electronic Records As Secondary Evidence", *available at:*http://www.mondaq.com/india/x/614920/trials+appeals+compensation/Supreme+Court+on+Admissibility+of+Electronic+Records+as+Secondary+evidence(last visited on Oct. 23,2018)
[33]*Ibid.*
[34]2014 SCC OnLine Cal 18816. See also, *Ram Kishan Fauji* v. *State of* Haryana, 2015 SCC OnLine P&H 5058.
[35]*Supra* n. 3.
[36] SLP (Crl.) No. 2302 of 2017, *available at:* https://supremecourtofindia.nic.in/supremecourt/2017/6212/6212_2017_Judgement_30-Jan-2018.pdf (last visited on Oct. 23, 2018).

Diluting the ratio of *Anwar* ruling, it further held that "electronic evidence is admissible under the Act. Sections 65A and 65B are merely clarificatory and procedural in nature and cannot be held to be a complete code on the subject. This interim decision seems to have restricted the applicability of the statutory certificate required under 65B(4) of the Act or may have carved out an exception to applicability thereof."[37] This judgment may provide sanctity to considerably significant evidence that was earlier not taken into account in view of being procedurally uncertified in accordance with Section 65B(4) of the Act. It will be interesting to observe how the other court(s) interpret the view taken by the Apex Court.[38]

It is being argued by some that this interim decision by a two judges bench in a SLP although cannot technically overrule a three judge bench decision of 2014 but will facilitate production of false evidence and change the onus of proving that it is inadmissible on the defence.[39] The *Anwar* judgement had clearly segregated 'admissibility' from 'genuineness' and had indicated how the two should be handled by the Court. The current order has completely ignored this part of the *Anwar* judgment and is not a correct interpretation.[40]

III. TIME OF PRODUCTION OF CERTIFICATE UNDER SECTION 65B

Although the *Anwar* judgment to a very large extent clarified the position relating to section 65B certification, but it did not specify anything on time of filing of such certificate i.e., whether the said certificate is required to be filed with the charge sheet or it can be submitted at the later stage, during the trial. In the absence of any Supreme Court ruling, this issue was addressed by Delhi and Rajasthan High Courts taking the view that the said certificate can be filed at a later stage. In the case of *Kundan Singh* v. *State*,[41] an appeal against murder conviction where the chain of events were created using electronic evidence, the section 65B certificate pertaining to the CDR of the accused was not submitted along with the charge sheet. It was submitted by the nodal officer of the concerned telecom agency at the time of his re-examination only.

The division bench of the Delhi High Court was required to decide as to whether a certificate under sub-section (4) to section 65B must be issued simultaneously with the production of the computer output or it can be issued and tendered when the computer output itself is tendered to be admitted as evidence in the court or, as in the present case, by the official when the accused was recalled to give evidence. The Court referred to the Supreme Court judgment in *Anwar* on the issue. To quote: [42]

> "The expression used in the said paragraph is when the electronic record is 'produced in evidence.' Earlier portion of the same sentence emphasizes the importance of certificate under section 65B and the ratio mandates that the said certificate must accompany the electronic record when the same is produced in evidence".

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[37]Rajiv Shanker Bhatnagar, *et al*., Supreme Court elucidates upon the scope & necessity of certificate under section 65B of the Indian Evidence Act, 1872 *available at*: http://www.mondaq.com/india/x/677072/trials+appeals+compensation/Supreme+Court+Elucidates+Upon+The+Scope+Necessity+Of+Certificate+Under+Section+65B+Of+The+Indian+Evidence+Act+1872and https://www.khaitanco.com/PublicationsDocs/Khaitan%20&%20Co-Ergo-Update-23Feb2018RB.pdf?cv=1(last visited on Oct. 23, 2018).

[38]*Ibid.*

[39]Vijayashankar Na, "Recipe for corruption in Judiciary- Supreme Court judgement" in *Shafhi Mohammad* v. *State of Himachal Pradesh, available at:* https://www.naavi.org/wp/recipe-for-corruption-in-judiciary-supreme-court-judgement-in-shafhi-mohammad-v-state-of-himachal-pradesh/ (last visited on Oct. 24,2018).

[40]*Ibid.*

[41]2015 SCC Online Del. 13647.

[42]*Supra* n. 17.

According to the Delhi High Court, "the aforesaid paragraph does not postulate or propound a ratio that the computer output when reproduced as a paper print out or on optical or magnetic media must be simultaneously certified by an authorised person under sub-section (4) to section 65B. This is not so stated in section 65B or subsection (4) thereof. Of course, it is necessary that the person giving the certificate under sub-section (4) to section 65B should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in sub-section (2), identify the electronic record, describe the manner in which 'computer output' was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer. The Delhi High Court held that *Anwar case* does not state or hold that the said certificate cannot be produced in exercise of powers of the trial court under section 311Cr PC[43]or, at the appellate stage under section 391 Cr PC."[44] The Division Bench refused to accept the legal ratio of *Ankur Chawla* v. *C.B.I.*[45] that "the certificate must be issued when the computer output was formally filed in the court and certificate under section 65B cannot be produced when the evidence in the form of electronic record is tendered in the court as evidence to be marked as an exhibit."

On a similar note, in *Paras Jain* v. *State of Rajasthan,*[46] the single judge bench highlighted a well settled legal position that "the goal of a criminal trial is to discover the truth and to achieve that goal, the best possible evidence is to be brought on record. Thus, in all the cases where the police has not filed the certificate under section 65B, the prosecution agency can file the certificate by way of supplementary charge sheet under section 173(8) of Cr PC. It is a statutory right which does not even require the prior permission of the magistrate. While coming out with this deduction, the Court reasoned that when legal position is that an additional evidence, oral or documentary, is allowed to be produced during the course of trial, if in the opinion of the court its production is essential for the proper disposal of the case, how it can be held that the certificate as required under section 65-B of the IEA cannot be produced subsequently in any circumstances, if the same was not procured along with the electronic record and not produced in the court with the charge-sheet. According to the court it is only an irregularity, a defect which is curable, not going to the root of the matter." It is also pertinent to note that in the present case, the certificate was produced along with the charge-sheet but it was not in a proper form. However, later during the course of hearing of these petitions, it was produced in the prescribed form.

In *Kundan Singh*[47] case the Delhi High Court, in a part of the judgment, also considered the hearsay rule in the context of electronic evidence. Since the CDRs were in question, the court distinguished between electronic records automatically created and those requiring human intervention.

The Delhi High Court observed that "in *Anwar*, the Supreme Court noticed the difference between relevancy and admissibility which is examined at the initial stage and genuineness, veracity and reliability of evidence which is seen by the court subsequently. Thus, the ratio and dictum in *Anwar P.V* is premised on the difference between admissibility

[43]CrPC, s. 311 reads: Power to summon material witness, or examine person present at any stage of any inquiry, trial or other proceeding under this Code.
[44]*Id*., s. 391 reads Appellate court may take further evidence itself or direct the Magistrate to take it if it thinks necessary.
[45]2014 SCC Online Del. 6461.
[46]2015 SCC Online Raj. 8331.
[47]*Supra* n. 40.

and veracity or evidentiary value. The Supreme Court dealt with the aspect of admissibility in strict legal sense, without confusing it with evidentiary value /correctness of contents."

Analysing the Anwar judgment, the High Court of Delhi drew observation that section 65B nowhere states that the contents of the computer output shall be treated as the truth of the statement. It only deals with the admissibility of secondary evidence in the case of an "electronic records" and not with the truthfulness or veracity of the contents. Mere admission or admissibility of the electronic record would not mean that the contents of the electronic record have been proved beyond doubt and that they are automatically proved when the document is marked exhibit. Mere marking of a document as exhibit does not dispense with the proof of its contents.[48] Section 65B simply authenticates the computer output, it will only show and establish that the computer output is the print out or media copy, etc. of the computer from which the output is obtained.

To put it simply, the Court held that "section 65-B remains an issue of admissibility, not reliability. The court has still to rule out when challenged or otherwise, the possibility of tampering, interpolation or changes from the date the record was first stored or created in the computer till the computer output is obtained. The courts must rule out that the records have not been tampered and read the data or information as it originally existed."

The Delhi High Court held that "evidence may be offered for different purposes and there is difference between a 'factum of statement' and 'truth of a statement.'[49] Thus, electronic record produced as a statement as a tangible in form of a CD, print out on paper, etc. as a fact in itself, must be distinguished from electronic record, which is produced to prove truth of the matter it asserts or correctness of contents for the latter postulates adjudication of veracity and credibility of the information by the person who has made a statement offering or producing the document for its truth."

Where an electronically generated record is entirely a product of functioning of a computer system or computer process like call record details or a report generated on a fax, it is not hit by the hearsay rule. Computer generated telephone records are not similar to a statement by a human declarant and, therefore, cannot be treated as hearsay and the credibility and evidentiary value is determined on the reliability and accuracy of the process involved.

In *Avadut Waman Kushe* v. *State of Maharashtra*,[50] the Bombay High Court judge observed that "a perusal of the provision of section 65-B(4) shows that, there is nothing in the provision that specifies the stage of production of the certificate. Rather the Court inferred that the indication therein is otherwise, as the provision of section 65-B is about admissibility of electronic record and not production of it." Further, from the opening words of section 65-B(4)- "In any proceedings where it is desired to give statement in evidence", it is clear that the certificate can be filed at the time the record is tendered in evidence. It need not be filed at the time of production of the electronic record, definitely not at the stage of filing of the charge sheet which is the preliminary stage of the proceedings, and the subsequent filing of the certificate cannot reduce its effectiveness. The writ petition was accordingly dismissed by the Court.

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[48]*Sait Tarajee Khimchand* v. *Yelamarti Satyam*, AIR 1971 SC 1865; *Narbada Devi Gupta* v. *Birendra Kumar Jaiswal* (2003) 8 SCC 745 and *Mohd. Yusuf* v. *D*, AIR 1968 Bom. 112.

[49]This distinction has been recognised and accepted in several judgments like *J.D. Jain* v. *State Bank of India*, AIR 1982 SC 673 and *S.R. Ramaraj* v. *Special Courts, Bombay* (2003) 7SCC 175.

[50]2016 SCC Online Bom. 3236.

Again, in *Eli Lilly and Company* v. *Maiden Pharmaceuticals Ltd*.,[51] a suit filed for injunction in case of infringement of trademark and passing off in 2007, the issue before the High Court of Delhi was whether the certificate or affidavit as required under section 65-B must be filed along with the electronic evidence, or it can be filed subsequently also, when the evidence extracted from the electronic record had already been filed in the court.

The counsel for the plaintiffs, in response to the objections raised by the defendant counsel on filing of some documents for the first time with the affidavit, contended that the need for filing an affidavit under sections 65-A and 65-B of the IEA arose only because of the creation of separate commercial courts after coming into force of The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 (Commercial Courts Act) *w.e.f.* October 23, 2015.[52] It was also argued that the plaintiffs have filed the computer printouts as well as CDs of the electronic record at the appropriate time and the affidavit aforesaid under sections 65-A and 65-B is in support thereof.[53]

Although the ratio in Anwar, according to the reading of Endlaw J., required the certificate/affidavit under section 65-B of the Evidence Act to accompany the electronic record when produced in the court, the later judgment of a single judge of High Court of Rajasthan and Division Bench of High Court of Delhi added more clarity on the issue. In *Paras Jain* v. *State of Rajasthan*,[54] the judge observed that "when additional evidence, oral or documentary, can be produced during the course of trial, if in the opinion of the court it is essential for the proper disposal of the case, how can the certificate under section 65B be denied subsequently, if the same was not submitted along with the electronic record and not produced with the charge sheet in the court. It can be considered a curable irregularity not going to the root of the matter." Further, the Division Bench of the High Court of Delhi in *Kundan Singh* v. *State*[55] held that "the words 'produced in evidence' did not postulate that the computer output when reproduced as paper print out/optical/magnetic media must be simultaneously certified by an authorised person under section 65-B(4)."

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[51]2016 SCC Online Del. 5921.

[52]*Id.* at para 8.-Attention was also drawn to sub-rules (1), (2), (5) and (6) of Order XI R. 6 of the CPC as applicable to commercial disputes by the plaintiff.

[53]Deepa Kharb, "Cyber Law", 51 *ASIL* 439-454 (2015). See, para 16 reads: It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice; *Supra* n. 17.
Para 17. Only if the electronic record is duly produced in terms of s. 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation; resort can be made to s. 45A – opinion of examiner of electronic evidence.
Para 22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under s. 63 read with s. 65 of the Evidence Act shall yield to the same. *Generaliaspecialibus non derogant*, special law will always prevail over the general law. It appears, the court omitted to take note of ss. 59 and 65A dealing with the admissibility of electronic record. Ss. 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Ss. 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in *Navjot Sandhu case* (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

[54]2015 SCC Online Raj. 8331.

[55]2015 SCC Online Del. 134647.

According to the Court, "all that is required is that the person giving the certificate under section 65-B(4) should be in a position to certify and state that the electronic record meets the stipulations and conditions mentioned in section 65-B(2), identify the electronic record, describe the manner in which computer output was produced and also give particulars of the device involved in production of the electronic record for the purpose of showing that the electronic record was prepared by the computer."

It thus had to be held, according to the single judge, that "the plaintiffs are entitled to file the certificate under section 65-B of the IEA, even subsequent to the filing of the electronic record in the court. Order XI Rule 6 of Code of Civil Procedure, 1908 (CPC) as applicable to commercial suits is also not found to provide to the contrary. It was also held that section 65-B of the IEA and the interpretation therein applies to civil suits also. However, the Court, concurring with the recent judgements referred above, added a word of caution here that the late filing of the certificate should be allowed only if the party makes out a case for reception thereof. If the party so producing the said certificate/affidavit is unable to satisfy the court as to the reasons for which the certificate/affidavit was not filed at the appropriate time, may run the risk of the certificate/affidavit being not permitted to be filed and resultantly the electronic record, even if filed at the appropriate time, remaining to be proved, to be read in evidence. Not only so, even if the delayed filing of the said certificate/affidavit is permitted by the court, the party producing the same may run the risk of being not able to prove the said electronic record."

Further, there is one more possibility that the person in a position to identify the electronic record and to give particulars of the device involved in the production of the electronic record and as to other matters prescribed in section 65-B(2) and in Order XI Rule 6(3) of the CPC may not be subsequently available(situation discussed later in the survey in the case of *Saidai Duraisamy* v. *Stalin*[56] or with frequent changes in technology, the device involved in the production of electronic record may not be identifiable and the certificate/affidavit may not withstand the cross-examination by the opposing counsel on the said facts, leading to the electronic record being not read in evidence and the plea taken on the basis thereof remaining to be proved.

Thus, merely because it has been held that the certificate/affidavit under section 65-B and/or order XI Rule 6 of CPC can be filed at a subsequent stage, does not mean that the parties to a litigation do not file such certificate/affidavit along with electronic record produced before the court. The proof of the said certificate/affidavit, unlike other documents, will be much more stringent. However, it will be open to the counsel for the defendant to cross-examine the deponent of the said affidavit and the proof of the said affidavit under sections 65-A and 65-B of the IEA shall be subject to such cross-examination and if it is found that the deponent of the affidavit was not a competent person to issue the certificate/affidavit, needless to state, the electronic record tendered in evidence shall also not be read.

IV. WHO MAY ISSUE A CERTIFICATE UNDER SECTION 65B

A peculiar situation anticipated by Endlaw J. in *Eli Lilly*[57]came up for consideration before the High Court of Madras in *Saidai Duraisamy* v. *Stalin*.[58] The High Court took

[56]2016 SCC Online Mad. 23264.
[57]*Supra* n. 50.
[58]*Supra* n. 55.

cognizance of this application filed by the petitioners in an election petition praying for the issue of 'subpoena' to an Assistant Returning Officer to give evidence/issue certificate for the purpose of proving the 15 CDs marked as exhibit under section 65B of the IEA. The situation arose as the person marked as the competent person to issue certificate under section 65B (4), the then returning officer, could not be summoned at the address furnished.

The application was opposed by the respondents contending that issue of subpoena, a time delay tactics by petitioners, would amount to abuse of process of law and illegal for two reasons:

> (i) the plaintiff has merely submitted the CDs in the court without certificate required under section 65-B of IEA, hence making it inadmissible;
> (ii) the Assistant Returning Officer sought to be summoned by the Petitioner who was working with the Returning Officer at that time and could not be served in the addresses furnished, was not identified by C.W.2 as a person competent to issue certificate, hence not competent to issue certificate.

The Court observed that "in terms of section 65-B when a statement has to be produced in evidence, it should be accompanied by a certificate showing compliance with the conditions of sub-section (2) of section 65-B of the Act. An electronic evidence without a certificate cannot be proved by means of oral evidence and also the opinion of an expert under section 45-A of the IEA, cannot be resorted to make such electronic evidence admissible. Section 45-A can only be availed once the provisions of section 65-B are very much fulfilled." Therefore, compliance of the ingredients of section 65-B are now mandatory for relying upon any electronic record in a case.

Further, the court observed that "an objection as to the mode of proof ought to be taken before a document is admitted and marked as exhibit. However, when the document is accepted before a court of law/trial court, the party against whom it is being brought on record is entitled to question it on the ground of its inadmissibility."

If after the admission of a particular document it is later found to be irrelevant and inadmissible in the eyes of law, it may be rejected at any stage of the suit as per Order 13 Rule 3 of CPC.[59] The Court therefore directed the registry to issue subpoena to the concerned official.[60]

V. CONCLUSION

Electronic records in the form of CDRs, CCTV footage to emails are dealt by the courts nowadays in civil as well as criminal matters on a regular basis. Recognition of electronic evidence as evidence under the IEA through amendment in 2002 and introduction of sections 65A and 65B to provide for the admissibility of electronic evidence was a major change. Despite their evidentiary relevance, the accuracy and reliability of electronic records, in contrast to their physical counterparts is always suspected for obvious reasons, creating conflict between their relevancy and admissibility.

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[59] CPC,1908- Order XIII: Production, Impounding and Return of Documents-
Rule 3. Rejection of irrelevant or inadmissible documents-
The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

[60] Deepa Kharb, "Cyber Law", 52 *Annual Survey of Indian Law* 401-423(2016).

Judicial pronouncements by various high courts and the Supreme Court of India have tried to elucidate the scope of the provisions applicable to electronic documents. However, there has been a significant lack of consistency in practice in this regard. An attempt by *Anwar* decision to address this problem and to standardise by explaining and laying down the requirements under section 65B has been short lived and recent approaches adopted by high courts and the Supreme Court in this regard have diluted the ratio.

Though we cannot be oblivious to the inevitable technological advancements and restrict ourselves to the methods proposed by *Anwar*, new authentication methods in addition to certificates obtained in lawful manner can be adopted to address the issue is not properly addressed by this judgment.

SOCIAL GLOBALIZATION AND INTRODUCTION OF NEW LEGAL NORMS: A STUDY IN THE LIGHT OF THE TRIPLE *TALAQ* ORDINANCE 2018

*Naseema P.K.**

I. INTRODUCTION

It is an admitted fact that globalization is a process that promotes the diffusion of ideas and norms of equality for women, though some societies resist such changes. Better conditions in women's lives will equip them with greater opportunity for empowerment. In fact, globalization creates such an environment by the exchange of ideas and sharing of cultural values between two nations. It is also true that women need support in many respects as they have not yet received their share of rights even in modern societal life. A commonly accepted definition of globalization includes not only economic, but also political, cultural, social, and technological interactions across countries.[1] In other words, globalization also represents the spread of ideas, information, values and people, going beyond the flow of goods, capital and services or market exchanges.[2] It is thus affecting almost all different dimensions of life including political as well as economic and social life of all. It influences women's life and welfare as well. This paper studies in detail whether globalization can be used for improving women's rights and if so, to what extent it is used and how to utilize it more effectively for benefits of women. It may enhance 'women's status' or 'women's rights', which allow women better access to resources and ensure their standing in legal and social institutions without discrimination.[3] Globalization can provide the seeds for cultural transformations that improve the conditions of women. There are views that show that economic globalization positively affects women's rights.[4] But in order to understand whether globalization will reduce the causes of gender discrimination, a focused look beyond its effect on economic activities of women shall be done. Such a study that deviates from the outcomes of women's economic activities and concentrates on fundamental rights of women and focuses on social globalization only can reveal how far it is useful in bringing the desired social norms.

Social globalization can be understood as information flows, personal contacts, and cultural sharing across countries.[5] It can influence women's rights because it can promote the spread of ideas, norms and civil actions worldwide by facilitating contact and communication across people indifferent countries.[6] Potrafke and Ursprung also show that both social and economic dimensions of globalization are positively associated with women's institutional

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[1] Axel Dreher, "Does Globalization Affect Growth? Empirical Evidence from a new Index", 38(10) *Applied Economics* 1091-1110 (2006).

[2] Cho, S.Y, "Integrating Equality - Globalization, Women's Rights, and Human Trafficking Economics of Security", Working Paper 69, Berlin: Economics of Security7 (2012).

[3] Christian Morrison & Johannes P. Jütting, "Women's Discrimination in Developing Countries: A New Dataset for Better Policies", 33(7) *World Development* 1065-1081(2005).

[4] Eric Neumayer & Indra de Soysa, "Globalization, Women's Economic Rights and Forced Labour", 30(10) *World Economy* 1510-1535(2007), Eric Neumayer & Indra de Soysa, "Globalization and the Empowerment of Women: An Analysis of Spatial Dependence *via* Trade and Foreign Direct Investment", 39(7) *World Development* 1065-1075(2011), Richards, David & Ronald Gelleny, Women's Status and Economic Globalization, 51 *International Studies Quarterly* 855-876 (2007)

[5] *Supra* n.1.

[6] Rosenau, James N, *Distant Proximities: Dynamics Beyond Globalization* (Princeton University Press, 2003).

rights.[7] While economic globalization mainly reflects the flows of goods and services for the interests of capital, social globalization connects people and enables them to exchange ideas and information, besides pursuing solidarity in shared causes of human rights and gender equality.[8] People living in countries with a high level of social globalization are more likely to express and respect opinions different from tradition and conventional thinking, as well as demonstrating increased cohesion in shared causes for change.[9] In this respect, social globalization could lead to societal tolerance and acceptance for progress in women's rights and their alternative roles.[10] Positive effects can be stronger for women because women would not lose but rather benefit through changes challenging the established male-dominated societal structures which social globalization may bring about.[11] As women's rights are deeply grounded in culture and value systems,[12] cultural exposure and proximity with other diverse cultures can have a positive impact in reducing discriminatory cultural practices against women.

Social globalization can therefore create changes in the perceptions and attitudes towards women and thus, the impact of social globalization on women's rights is arguably stronger than that of economic globalization. In particular, social globalization will have a positive impact on women's social rights, granting equality in family matters and self-governance because these rights directly reflect societal perceptions and attitudes towards women.[13]In this respect there are similar views[14]while focusing on the diffusion of women's rights through international interconnectedness.

II. INTERNATIONAL ORGANIZATIONS AND THEIR ROLE

International interconnectedness means not only sharing of economic resources but also commitments to the international organizations such as the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). CEDAW and similar Conventions are an important driving force for diffusing gender equality worldwide and such multicultural contacts at the personal level can influence people's exposure to new ideas, values, and norms more directly than integration at the country level.[15] Sweeney also investigates the effects of CEDAW and democracy on the spread of attainment of women's rights in particular economic rights.[16]

Important international governmental organizations like United Nations (UN) and World Bank and its Conventions have promoted the diffusion of ideas and norms supporting improvements in the status of women. From its inception, the UN has addressed issues concerning women. In the late 1940s and 1950s the UN established a Commission on the Status of Women and sponsored a Convention on the Political Rights of Women. After a long

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[7]Potrafke, Niklas & Heinrich W. Ursprung, "Globalization and Gender Equality in Developing Countries", 28(4) *European Journal of Political Economy* 488-505 (2012).
[8] *Supra* n.2 at 3.
[9] *Supra* n.6.
[10] *Supra* n.2 at 4.
[11]*Ibid.*
[12] Simmons, Beth, *Equality for Women: Education, Work and Reproductive Rights, Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press, 2009).
[13] *Supra* n.2 at 8.
[14]Gray, Mark M., *et.al*., "Women and globalization: A study of 180 countries, 1975–2000", 60(2) *International Organization* 293- 333 (2006).
[15]*Supra* n.2 at 4.
[16]Shawna Sweeney, "Government Respect for Women's Economic Rights: A Cross National Analysis, 1981-2003", in Shareen Hertel & Lanse Minkler (ed.), *Economic Rights: Conceptual, Measurement, And Policy Issues* (Cambridge University Press, 2007).

lapse, the UN declared a 'Decade for Women' (1976 to 1985) and held a series of international conferences on women in 1980 (Copenhagen), 1985 (Nairobi), and 1995 (Beijing). The conferences established a Bill of Female Rights which addressed violence against women, health, employment, education, and poverty. In 1995 it resulted in a Platform for Action. These conferences on women worked to channelize the ideas for global women's movements into commitments at the level of nation-states through formulating a policy action. The Beijing Conference, and later the UN Assembly introduced an innovative approach for addressing women's inequality called 'gender mainstreaming' and demanded governments to make gender equality an explicit and central part of all policy and planning. UN showed its commitment towards gender inequality through the General Assembly by adopting the CEDAW in 1979.It called for government action on several policies designed to support women, such as maternity leave and access to childcare. Though many nations were reluctant to ratify it, CEDAW became the main international legal document on women's rights.[17] Its existence created a source of legitimacy with which women could justify their claims to their own national governments. The World Bank has also addressed women's issues. It appointed an advisor on Women in Development in 1977, but paid little attention to gender issues prior to the 1980s.[18] In the light of the UN conferences and Conventions, the World Bank also began increasing staff for gender work in 1987. It started to integrate women's issues into lending and development programs. After the Beijing Conference, the World Bank assessed their programmes for women and took input from women's NGOs in its policy processes and allocated more money on women's health, education, and microfinance.[19] Thus, international organizations have actively articulated and diffused transnational norms of gender equality.[20] They have empowered women's groups and organizations, which can use international treaties and declarations to press their governments to live up to their commitments in the area of gender equity so as to bring domestic reforms.[21] As said before, it is true that since 1990s the UN has called all countries to adopt gender mainstreaming and gender budgeting, but it found many difficulties at the level of implementation since the compliance rate among national government agencies is very low.[22]

At the same time, it is to be admitted that these conferences had fostered the growth of a transnational feminist movement.[23] Non-governmental organizations held meetings parallel to the UN Conferences and attendance at the NGO forums increased.[24] These grassroot connections complemented and supported the connections made among official governmental delegates. The increasing number and activism of women's NGOs ensured that other UN conferences and specialized agencies would also address the gender dimension.[25] Women's concerns have come up prominently in a variety of UN conferences including the 1994 Earth

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[17] Keck Margaret, E. & Sikkink Kathryn, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, New York, 1998).

[18]Nuket Kardam, Bringing *Women in: Women's Issues in International Development Programs* (L. Rienner Publishers, 1991).

[19] Hafner-Burton, *et.al.*, "Mainstreaming gender in global governance", Paper for the mainstreaming gender in European Public Policy Workshop, University of Wisconsin-Madison.14-15 (2000).

[20]*Supra* n.14.

[21] Irene Tinker, "Non-governmental organizations: An alternative power base for women?" in Mary K. Meyer & Elisabeth Prügl, (ed.), *Gender Politics in Global Governance* 101 (Rowman & Littlefield Publishers, Inc., 1999).

[22]Nurazizah N, "The Paradoxical Impact of Globalization on Women's Political Representation: A Review of Situations In Southeast Asia", 6(1) *Journal of Government and Politics* (2015), *available at*: http://journal.umy.ac.id/index.php/jsp/article/view/226/441 (last visited on Nov. 8, 2018).

[23]*Supra* n.17.

[24] Jacqui True & Michael Mintrom, "Transnational networks and policy diffusion: The case of gender mainstreaming", 45(1) *International Studies Quarterly* 27-57 (2001).

[25]Jutta Joachim, "Framing Issues and Seizing Opportunities: The UN, NGOs, and Women's Right", 47(2) *International Studies Quarterly* 247-74 (2003).

Summit in Rio de Janeiro, the 1995 International Conference on Population and Development, the 1993 World Conference on Human Rights, and the 1995 World Summit for Social Development.[26]

III. IMPACT OF CEDAW ON THE RIGHTS OF WOMEN

There are substantial effects of the CEDAW for women's equality in many countries like Pakistan where the adoption of the CEDAW has culminated in a new debate over women's roles, promoted women's movement and even pushed the government to establish an autonomous National Commission for women. It created a definite paradigm shift in women's access to power albeit slowly and in limited quarters.[27]Similarly in Turkey, the CEDAW brought the issue of women's rights to the national agenda leading to creation of women's agencies and these women's organizations that emerged have used CEDAW to bring necessary changes.[28]Costa Rica passed its far-reaching statute on equal rights for women.[29]

It is true that cultural change is necessary for institutional change, which ultimately brings improvements in women's lives.[30]Changes in attitudes and values are key for women to achieve greater equality in institution like family and changes in institutions can alter culture too. International organizations and declarations designed to promote women's equality can shape national attitudes. As discussed above, institutions such as CEDAW can act as mechanisms for change.

IV. FAMILY LAW REFORMS AND DIVORCE RIGHTS OF WOMEN: A COMPARATIVE STUDY

Though expanding international ties open the way to improvements in the quality of life and status of women, they in no way imply that globalization is good for all women everywhere.[31] The innovative measures of CEDAW had influenced the prospective thinking like an egalitarian society promoting gender equality. But countries may not follow a uniform pattern of legal norms though the whole world is considered as a global village. For example, many Muslim countries had introduced changes and had brought reforms in their personal laws regarding triple *talaq*. Still it is seen that various schools of thought in different countries varies in their approach on this issue. It is one of the hottest topics of debate between jurists who favor the three-is-three position and those who favor the three-is-one position. Overview of reforms carried out by many Muslim states will give a clear picture that they differ on many aspects and also how and when these reforms were initiated.

Egypt was the first county to deviate from the majority of Muslim jurists in 1929. It provided that a divorce accompanied by a number expressly or implied, shall count only as a single divorce and such a divorce is revocable except when three *talaqs* are given, one in each

[26]*Supra* n.21.
[27] Anita M Weiss, "Interpreting Islam and women's rights implementing CEDAW in Pakistan", 18(3) *International Sociology* 581-601 (2003)
[28]Celik, Yasemin, "The Effect of the CEDAW on Women's Rights in Turkey", Annual meetings of the American Political Science Association, (Sept. 2004).
[29] Rojas, Roberto, "*Los derechoshumanosen la politica exterior costarricense*", 1(1) *RevistaCostarricense de Política Exterior* 5-14 (2001).
[30] Ronald Inglehart & Pippa Norris, *Rising Tide: Gender Equality and Cultural Change Around The World* (Cambridge University Press, 2003).
[31] *Supra* n.14.

tuhr.[32] The Sudanese law of 1935 provides that pronouncement of all divorces by the husband is revocable except the third one, along with a divorce before consummation of marriage, and a divorce for consideration.[33] The Syrian law of 1953 combined the provisions of the Egyptian and the Sudanese laws by providing that if a divorce is coupled with a number, expressly or implied, not more than one divorce shall take place and every divorce shall be revocable except a third divorce, a divorce before consummation, and a divorce with consideration, and in this law such a divorce would be considered irrevocable.[34]Morocco and Iraq also moved in similar terms in 1957 and 1959 respectively.[35]Jordan, Afghanistan, Libya, Kuwait and Yemen also adopted similar laws in 1976, 1977, 1984, 1984 and 1992 respectively.[36]These Muslim countries accepted Ibn Tamiya's opinion as the guideline for their personal laws on this topic. The list includes the United Arab Emirates and Qatar and Bahrain being the latest countries.[37]

As per Article 30 of the Tunisian Code of Personal Status, 1956, divorce pronounced outside a court of law will not have any validity whatsoever. Under Article 32, divorce shall not be decreed except after an overall inquiry by the court into the causes of the divorce and fails to bring about reconciliation. In Algerian law, divorce will be established after an attempt of reconciliation by the judge who shall not exceed a period of three months.[38] Similarly, Sri Lanka's Marriage and Divorce (Muslim) Act, 1951 as amended up to 2006, provides that a husband intending to divorce his wife is under a duty to give notice of his intention to the *qazi. Qazi* shall try for reconciliation between the spouses through the help of the relatives of the parties and of the elders and other influential Muslims of the area. However, if after thirty days of giving notice to the *qazi*, attempts at reconciling the spouses remain fruitless, the husband, if he desires to proceed with the divorce, shall pronounce the *talaq* in the presence of the *qazi* and two witnesses.[39] Under the family law of the Malaysian state of Sarawak, a husband who desires to divorce his wife has to request a court to look into the causes of proposed divorce and advise the husband not to proceed with it. However, if the differences are irreconcilable, then the husband may pronounce one divorce before the court.[40] The procedure laid down in the laws of Algeria, Sri Lanka, and the Malaysian state of Sarawak seems to be in harmony with the procedure of *talaq* in Islamic law.

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[32] Art. 3 of Law No. 25 of 1929, as amended by Law No. 100 of 1985 Concerning Certain Provisions on Personal Status in Egypt quoted in Muhammad Munir, "Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change", 2 *International Review of Law* 2-12 (2013).

[33]*Ibid*.

[34]Art. 92 of Law No. 34 of the Law of Personal Status of Syria of 1953.

[35]Art. 51 of Book Two of the Mudawwana of 1957 and 1958 of Morocco and Art. 37(2) of Law No. 188 of 1959: The Law of Personal Status of Iraq.

[36]Art. 90 of Law No. 61 of 1976: The Law of Personal Status of Jordan, s. 145 and s. 146 of the Civil Law of 4 January 1977 of Afghanistan, s. 33(d) of Law No. 10 of 1984, Concerning the Specific Provisions on Marriage and Divorce and their Consequences. For Kuwaiti law, see s. 109 of Law no. 51 of 1984 regarding "al-Ahwal al-Shakhsiyah" (Personal Law), *available at:* http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=1&LawTreeSectionID=1386. (last visited on Sep. 7,2018). Art. 64 of the Republican Decree Law No. 20 of 1992 Concerning Personal Status of Yemen.

[37]2For the UAE, see, s. 103(1) of Qanun al-Ahwal al-Shakhsiya (Personal Law) of UAE No. 28 of 2005, http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=2&LawTreeSectionID=6107, *available at:* (last visited on Sept. 7, 2018). See, s. 108 of the Qanun al-Usrah (Family Law) of Qatar, No. 22 of 2006, *available at*, http://www.gcc-legal.org/MojPortalPublic/DisplayLegislations.aspx?country=2&LawTreeSectionID=6107 (last visited on Sept. 7, 2010).

[38]See, Art. 49 of Law No. 84-II of 9 June 1984, Comprising the Family Law of Algeria.

[39]See Marriage and Divorce (Muslim) Act, 1951 as amended till 2006 [Cap. 134] s. 27 and R. 1 & 2 Second Schedule.

[40]See s. 43 and s. 45(1–4) of Ordinan 43 Tahun 2001, Ordinan Undang-Undang Keluarga Islam, 2001, Negeri, Sarawak.

Coming to India and Pakistan, which lie very close to each other, a variety of differences can be seen. The Constitutions of both the countries have a commitment to ensure gender equality under the International human rights' law. Though personal law is exempted in particular way, the judiciary has tried to reform many aspects of law from a feeling of obligation to protect human rights. But there are differences in directions and aspects that were reformed in these two countries, though geographically the two of them lie near. Pakistani judges interpreted it in such a way that in a divorce proceeding initiated by the wife, 'the consent of the husband is not necessary as the wife's right to divorce is on equal footing with that of the husband.[41] In other words, if the husband has a unilateral right, the wife too should not be denied such a right. In essence, '*khula'* is equated to '*talaq'*. This is nothing short of recognizing a wife's right to unilateral right to no fault divorce.

V. INDIAN SCENARIO AND THE ORDINANCE AGAINST TRIPLE TALAQ

But in India this development cannot be seen, except in a very few cases. Here wife's right to divorce was not extended, though there were some restrictions put to control husband's right to divorce. But the prevailing case law has a trend advocating a norm that *talaq* without a valid cause or not preceded by reconciliation is invalid. But it is promoting injustice also when the judiciary dictates it in the absence of legal norms as the aggrieved person has to wait for a long time, in the absence of specific legal norms. So, such reforms should be brought by legislators in tune with other progressive legislations in other countries, in order to make law specific and beyond confusions through activism. In this context, social globalization can be used as an effective tool. Otherwise it will lead to chaos and unrest in the society as the decision in *Rahmat Ulla* v. *State of U.P*[42]was considered against the spirit of Islamic law and as if rewriting of it, unknown to the overwhelming majority of Muslim jurists. Recently such an initiative was taken up after the decision in *Shayara Bano.*[43] After 33 years of the controversial *Shah Bano*[44] maintenance case, now Indian legal scenario is hot with debates about triple *talaq*. The debate is successfully framed as an Islam-versus-women's rights issue as done in *Shah Bano*. As the current *Shayara Bano*[45] matter goes, the disagreement is between those who see Islamic law opposing the idea of equality in the Constitution and those who argue that triple *talaq* is not Islamic and not as rightful by Quranic verses.[46] Thus, the result was that through the majority judgment Supreme Court set aside the triple *talaq* and the Chief Justice invoked Article 142 for putting an injunction on husbands from divorcing their wives for the next 6 months through this rare and extraordinary jurisdiction and sought for a legislation to end this evil. This finally culminated in an attempt to pass a Bill for this, but it failed. In this situation, the Government brought out an Ordinance namely, the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 on September 19, 2018.[47]

The Ordinance has its own strength, contradictions and issues, but it is to be admitted that it is a progressive step. Section 2(c) specifically provides that the jurisdiction related to any information related to triple *talaq* can be entertained by the magistrate in the area where

[41] Muhammad Zubair Abbasi, "Women's right to unilateral no-fault based divorce in Pakistan and India", 7(1) *Jindal Global Law Review* 81-95 (2016).
[42] Writ Petition No. 45 of 1993
[43]*Shayara Bano* v. *Union of India,* W.P No 118 of 2016, Writ Petition (C) No. 118 of 2016, (2017) 9 SCC 1.
[44]*Mohd. Ahmad Khan* v. *Shah Bano Begum* (1985) 2 SCC 556.
[45]*Supra* n. 43.
[46] Seema Chishti, "Why the triple talaq case before Supreme Court is different from Shah Bano's in 1986", The Indian Express, July 25, 2016, *available at*: http://indianexpress.com/article/explained/triple-talaq-case-islam-shayara-banu-triple-talaq-case-supreme-court-2933621 9 (last visited on Sept. 7, 2018).
[47] *Available at:* http://www.prsindia.org/billtrack/the-muslim-women-protection-of-rights-on-marriage-ordinance-2018-5456/(last visited on Sept. 7, 2018).

the married Muslim woman resides.[48] This of course is a women friendly approach where jurisdictional aspect is defined by limiting it to the place where she resides. The defining Section 2(b) which decides *talaq* as *talaq-e-biddat* is but a misnomer and is leading to confusions.[49] While, the word *talaq* indicates other types of *talaq* including *talaq-ahsan, talaq hasan* or *talaq-e-tafweez*, which are left untouched by the Ordinance, the use of the word *talaq* throughout the Ordinance is quite confusing leading to further conflicts. This necessitates a rewording of the word *talaq.* Section 6 which provides for the custodial right of children to women in the event of pronouncement of *talaq* is again questionable because if the *talaq* itself is void, she is still having the right to matrimonial home and the marriage is still valid and how can the separate custody be claimed while nothing has been displaced from her as the pronouncement is void. Reformation of personal laws in tune with the ideals of justice is always to be welcomed, but a little bit of caution and avoidance of hasty steps could bring desirable social change more effectively. In bringing about the desired social change in a peaceful way, social globalization can be used as a tool.

VI. CONCLUSION

As discussed above, many scholars opine that social globalization should be a mechanism for promoting norms, values of democracy, human rights and 'learning processes' through information exchanges and personal interactions.[50] Social globalization, if used, offers more opportunities to communicate and form networks with each other and therefore, increases freedom of expression and civil association, making social progress and changes more feasible. This suggests a possible mechanism for transmitting the effects from social globalization to women's rights.[51] It can enable changes in women's role in society by decreasing cultural gaps across countries. It is social globalization that improves women's rights and empowers women. The positive impact of social globalization seems to be logical, given that improving women's rights in society is closely related to changes in perceptions, attitudes and ideas. Though independent economic resources and opportunities in the era of globalization give women more choices, their position in the social sphere is yet to be improved. It is expected that the more transnational activity people engage in, the more they absorb ideas and norms prevailing in international society as it is having a socialization effect. Socialization is a process through which actors learn the ideas, values, and norms of the social contexts in which they interact.[52] If a country internalizes norms and ideas diffused through cross-national interactions, it incorporates those norms and ideas into its domestic policies, laws, and institutions.[53] But it seems that the impact of globalization on women's rights is still limited.[54] It is true that norms and ideas in international society have not been incorporated in the status of Muslim women in India, particularly regarding their marital rights, because of extreme reluctance in India for any changes in Muslim Law, even when it is adopted in Islamic countries. So, it is important to focus on a better utilization of social globalization and bring the desired changes in the family law structure, upholding the equality of both the sexes and it is highly necessary to create an egalitarian society in consonance with human rights jurisprudence. A system either legal or social in which human

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[48] S.2 (c) of the Muslim Women (Protection Of Rights On Marriage) Ordinance, 2018, No 7 of 2018.

[49] *Id.* at s.2 (b).

[50] Easter N-L Chow, "Gender Matters – Studying Globalization and Social Change in the 21st Century", 18(3) *International Sociology* 443-460 (2003).

[51] *Supra* n.2 at 7.

[52] Harry, A Eckstein, "Culturalist Theory of Political Change", 82 (3) *American Political Science Review* 789 - 804 (1988).

[53] Andrew P. Cortell& James W. Davis Jr, "How Do International Institutions Matter? The Domestic Impact of International Rules and Norms", 40 (4) *International Studies Quarterly*451-78(1996).

[54] *Supra* n.2 at 23.

beings are discriminated on the basis of sex must change in tune with human rights. For this, a wider platform of awareness of equality of rights of all and the current changes in the global village is to be known to all, in which definitely social globalization has a role.

PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: THEN AND NOW

*Irwin L. Hnamte**

I. INTRODUCTION

The world has reached a stage of inventive proportions with technology stretching its arms to areas which were not known to the world but to those to whom it existed. This has posed global threat to the hitherto sacrosanct world of cultural heritage. "Expressions of folklore or elements of folklore were subjected to wide- scale commercial exploitation without any benefit flowing to the community who were the creators and the preservers of the folklore. Minimal respect or regard was shown to the custodians of the folklore in the worldwide commercialization process. As a progressive marketing strategy many of the exploiters resorted to mass-scale distortion hurting the cultural and social and even religious sentiments of the communities who had preserved the elements of folklore for centuries as their precious possessions."[1] It is indeed this phenomenon that has prompted the World Intellectual Property Organisation (hereinafter WIPO) to recently draw up Draft Articles for the Protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions (hereinafter TCEs). Before we embark on the possibility of having a codified legislation it is important for us to know why there is a need for such protection. This article is an attempt to understand the term 'Traditional Cultural Expressions', to give protection to these 'expressions', to afford rights to the holders of these expressions, etc. An attempt will be made to look at the latest Draft Articles drawn up by WIPO to answer questions raised on TCEs.

II. WHAT ARE TRADITIONAL CULTURAL EXPRESSIONS (TCES)?

The term Traditional Cultural Expressions (TCEs) refers to the work of indigenous people and the traditional communities, but there is no precise definition to it. TCEs in the international community are also referred to as "folklore". Folklore is a termed coined by William Thomas in the year 1846 and means "the traditional beliefs, myths, tales and practices of a group of people, transmitted orally, from one generation to another. Mr. Thomas meant to include manners, customs, observations, superstitions, ballads, proverbs and so on in the term 'folklore' which he summarized as the lore of the people."[2]

TCEs are the synonym of 'Expressions of Folklore'. According to the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions[3] adopted by UNESCO in 1982, "expressions of folklore" means productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community or by individuals reflecting the

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[1] *Available at:*http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf. (last visited on Mar. 23, 2018).

[2] Thomas was a British antiquarian who wanted a simple term to replace various awkward phrases floating around at the time to discuss the same concept; phrases such as "popular antiquities", "the lore of the people", and the manners, customs, observances, superstitions, ballads, proverbs etc, of the olden times".

[3] Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions, *available at*: http://www.wipo.int/wipolex/en/text.jsp?file_id=184668 (last visited on Mar. 23, 2018).

traditional artistic expectations of such a community. TCEs are in two forms, tangible and intangible. These include:

(i) Verbal Expressions or symbols (folk stories, legends and poetry)
(ii) Musical Expressions (songs, instrumental music)
(iii)Expressions by action (dance form, play, ritual etc)
(iv)Tangible Expressions (production of folk arts, especially drawings, paintings, sculpture, pottery, jewels, costumes, musical instruments and architectural works).

The main characteristics of TCEs are[4]:

(i) "they are handed down from one generation to another, either orally or by imitation;
(ii) they reflect a community's cultural and social identity;
(iii) they consist of characteristic elements of a community's heritage;
(iv) they are made by 'authors unknown and/or by individuals communally recognised as having the right, responsibility or permission to do so;
(v) they are often not created for commercial purposes, but as vehicles for religious and cultural expressions; and
(vi) they are constantly developing and being recreated within the community."

III. INTELLECTUAL PROPERTY PROTECTION

The Berne Convention for the Protection of Literary and Artistic Works[5] (Berne Convention) as an international convention "treats folklore as a special category of anonymous works." Article 15(4) of the Berne Convention was amended in the year 1967 to introduce optional copyright protection for folklore. The Article states that:

> "in the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of the country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."[6]

In 1976, the Tunis Model law on Copyright for Developing Countries was adopted. It included sui generis protection for expressions of folklore. It goes a few steps further than the Berne Convention by explicitly including 'folklore' in the list of protected works and providing that works of national folklore are to be protected against improper exploitation.[7]

The World Intellectual Property Organisation began to explore the field of TCEs in 1978. It convened three meetings of experts in cooperation with the United Nations Educational, Scientific and Cultural Organisation that led to the adoption in 1982 of the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (the Model Provisions). The Model Provisions developed a *sui generis* model for the IP- type protection of TCEs. They establish two main categories of acts against which TCEs are protected, namely 'illicit exploitation' and 'other prejudicial actions.'

[4]See Documents WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/13/4(b) Rev. Annex I, 4.
[5]Berne Convention for the Protection of Literary and Artistic Works.
[6]*Id.* at art.15(4).
[7]Daphne Zografos, *Intellectual Property and Cultural Expressions* 27(Edward Elgar Publishing Limited, UK, 2010).

In December, 1996 WIPO Member States adopted the WIPO Performances and Phonograms Treaty (WPPT)[8] which authorizes neighboring rights to artists who perform folklore. Performers of folklore thus enjoy moral rights and various economic rights provided by the WPPT. "However, protection in the WPPT is only applicable for those kinds of folklore that can be sung, performed and played. For tangible folklore such as traditional handicrafts, the WPPT does not provide protection."[9]

In April 1997, the 'UNESCO- WIPO World Forum on the Protection of Folklore' was held in Phuket, Thailand.[10] In 1999, WIPO organized regional consultations on the protection of expressions of folklore for African countries (March 1999), for countries of Asia and the Pacific region (April 1999), for Arab countries (May 1999), and for Latin American and the Caribbean (June 1999). Each of the consultations adopted resolutions or recommendations, which included the recommendations that WIPO and UNESCO increase and intensify their work in the field of folklore protection. The recommendations unanimously specified that future work in these areas should include the development of an effective international regime for the protection of expression of folklore.

In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established. Representatives from the WIPO member states, ethnic communities and NGOs joined the discussions. The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools. Drawing on this diverse experience, the Committee is moving towards an international understanding of the shared objectives and principles that should guide the protection of TCEs.

In 2007, the United Nations adopted the U.N. Declaration on the Rights of Indigenous Peoples which highlighted the need to final legal approaches that fall outside the framework of the Berne Convention. Since 2012, the IGC has already held 28 sessions relating to genetic resources, TK and folklore and the latest session was held between July 7-9, 2014. In this session the WIPO Secretariat prepared a text titled 'The Protection of Traditional Cultural Expressions: Draft Article'. The Draft Article provides a detailed sui generis system for the protection of folklore including 4 objectives,[11] definition of TCEs (subject matter) and criteria for their protection,[12] detailed definition of beneficiaries, their protection/ safeguarding,[13] criteria for eligibility for their protection/safeguarding,[14] administration of rights/ interests which includes responsibilities and functions of competent authority in collective management of rights,[15] exceptions and limitations,[16] term of protection/ safeguarding,[17] sanctions,[18] national treatment.[19] The provisions of the Draft Articles are more practical and

[8]WIPO Performances and Phonograms Treaty (WPPT), 1996.
[9]Luo Li, *Intellectual Property Protection of Traditional Cultural Expressions (Folklore in China)* 9 (Springer International Publishing, Switzerland, 2014).
[10] Available at: http://www.wipo.int/tk/en/cultural/index.html(last visited on 25th Apr. 2015).
[11]The Protection of Traditional Cultural Expressions: Draft Articles, WIPO Doc WIPO/GRTKF/IC/28/6 (2014) Objectives.
[12]*Id.* at art.1.
[13]*Id.* at art. 2.
[14]*Id.* at art.3.
[15]*Id.* at art. 4.
[16]*Id.* at art. 5.
[17]*Id.* at art. 6.
[18]*Id.* at art. 8.
[19]*Id.* at art.11.

operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore.

It is therefore clear that a need to protect the rights of the culture of the indigenous peoples has been deeply recognized not just by WIPO but through different international and national legislations as well. As has been mentioned the most recent document is the Draft Article prepared by WIPO titled 'The Protection of Traditional Cultural Expressions: Draft Article'. Our purpose in writing this article is an attempt to find out whether this document will indeed be the answer that the legislators, law makers, scholars and academicians are waiting in context to the protection of traditional cultural expressions.

The Protection of Traditional Cultural Expressions: Draft Articles

"The Draft Articles Prepared by WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) at its 28th Session held in July, 2014 provide a detailed *sui generis* system for the protection of folklore. The provisions of the Draft Articles are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article, due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore."[20]

The beneficiaries of protection in Article 2 of the Draft[21] extend to indigenous peoples and local communities only but not other communities. While the concept of "peoples" includes "nations" and acknowledges that within a "people", families, individuals and other subsets thereof may have closer association to the TK and TCEs, ownership of the knowledge remains with the collective. Thus there is no need to enumerate subsets of peoples when identifying branches. This option makes it clear that the people given protection will be within this definition.

Article 3 of the Draft incorporates the scope of protection and states that Indigenous Peoples have the right to maintain, control, protect, and develop their intellectual property interests over their TCEs. This protection maybe made possible through indigenous laws, customs and regulations administered through their own institutions and decision- making procedures.

States will need to take effective measures, including financial and technical assistance for ensuring that Indigenous Peoples are empowered to exercise these rights at the local, national, regional and international levels. To prevent unauthorized access to and utilization of their TCEs, Indigenous Peoples should be empowered to: define the subject matters using their terms; identify rightful holders; affirm that agreements are reached with free and prior informed consent (FPIC) and mutually agreed terms (MAT); ensure fair and equitable benefit- sharing; ensure adequate and appropriate disclosure and determine limitations on the utilization of TCEs. States may be required to affirm these provisions in national laws but in no way should such laws deprive Indigenous Peoples of their rights. The

[20] *Supra* at 9.
[21] *Id.* at art. 2.

standard for protection should be equal and be based on whether or not FPIC has been obtained to prior access and utilization of the knowledge, even if it is not secret or sacred.

Administration of Rights (Article 4) states that Indigenous Peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. In order to fulfill this Member States/Contracting parties are obligated to establish any national administrative body upon request of Indigenous Peoples, in full partnership with them, for their benefit and only with their FPIC. Indigenous institutions at the national level, created by Indigenous Peoples themselves, and provided with financial and administrative support from the Government would be an appropriate institution for protection of Indigenous Peoples' rights to their TCEs.

Exceptions and Limitations as per Article 5 of the Draft states that it should be determined by the Indigenous Peoples. The General Exceptions Clause[22] incorporates that "such limitations and exceptions must be made available provided the use of protected TCEs acknowledges the beneficiaries, where possible; is not offensive or derogative to the beneficiaries; is compatible with fair use/dealing/practice; does not conflict with the normal utilization of the TCEs by the beneficiaries and does not unreasonably prejudice the legitimate interests of the beneficiaries taking account of the legitimate interests of third parties. Where however, reasonable apprehension of irreparable harm related to sacred and secret TCEs, Member States/ Contracting Parties are not required to establish limitations and exceptions."

The Specific Exceptions Clause[23] mentions that "subject to the limitations in the previous paragraph, Member States/Contracting Parties may adopt appropriate limitations or exceptions, in accordance with national law, for the purposes of teaching, learning but not research resulting in profit-making or commercial purposes;[24] for preservation, display, research and presentation in archives, museums, libraries or cultural institutions, for non-commercial cultural heritage or other purposes in the public interest;[25] and the creation of an original work of authorship inspired by TCEs."[26] This provision is not applicable to protected TCEs described in Article 3.2. Regardless of whether such acts are permitted under Paragraph 1, the use of TCEs in cultural institutions recognized under the appropriate national laws, archives, libraries and museums for non-commercial cultural heritage or other purposes in the public interest, including for preservation, display, research and presentation should be permitted[27] and also the creation of an original work of authorship inspired by TCEs.[28]

Article 5.5 is an Exception Clause providing for "the protection of secret TCEs against disclosure, to the extent that any act would be permitted under the national law for works protected by copyright, or signs and symbols protected by trademark law, such act is not to be prohibited by the protection of TCEs."

Article 6 dealing with term of protection provides two options of protection. "Option 1 allows the Member States/Contracting Parties to determine the appropriate term of protection of TCEs in accordance with Article 3 and they may also determine that the protection granted to TCEs against any distortion, mutilation or other modification or

[22] *Id.* at art.5(1) and art. 5(2).
[23] *Id.* at art. 5(3), art. 5(4) and art.5(5).
[24] *Id.* at art. 5(3)(a).
[25] *Id.* at art. 5(3)(b).
[26] *Id.* at art. 5(3)(c).
[27] *Id.* at art. 5(4)(a).
[28] *Id.* at art. 5(4)(b).

infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the beneficiaries or region to which they belong and that such protection to last indefinitely.**"**[29]

In Option 2 Member States/Contracting Parties may determine the term of protection of TCEs, at least as regards their economic aspects and is to be limited.[30]Indigenous Peoples own their TCEs in perpetuity. Thus, legitimate utilization should be for a term agreed upon, provided that all rights over the knowledge revert to Indigenous Peoples upon expiration of the agreed term.

"Sanctions, remedies and exercise of rights in Article 8 make mention of two (2) Options wherein Member States/ Contracting Parties can provide appropriate legal, policy or administrative measures, in accordance with national law, to ensure the application of this instrument [31] or provide accessible, appropriate and adequate enforcement and dispute resolution mechanisms, border measures, sanctions and remedies, including criminal and civil remedies, to ensure the application of this instrument.[32] In case of dispute arising between beneficiaries, or between beneficiaries and users of TCEs, each party is to refer the issue to an independent dispute resolution mechanism recognized by international, regional or national law. [33] The means of redress for safeguarding the protection granted by this instrument is to be governed by the national of the country where the protection is claimed."[34]

Transitional measures in Article 9 lays down the opportunity to be given to Indigenous Peoples to account for knowledge that has been misappropriated from their communities and provided with fair, independent, impartial, open and transparent remedies to address misappropriated TCEs. With respect to TCEs that have special significance for the beneficiaries and which have been taken outside of the control of such beneficiaries, these beneficiaries are to be given a right to recover such TCEs.[35]

Article 10 discusses the relationship of the Draft provisions with other international agreements. It states that "Member States are required to implement this instrument in a manner mutually supportive of other existing international agreements and nothing in this instrument is to be construed as diminishing or extinguishing the rights that Indigenous Peoples or local communities have now or may acquire in the future."[36]

Article 11 includes the National Treatment principle. The rights and benefits arising from the protection of TCEs under national measures or laws that give effect to this instrument is to be made available to all the beneficiaries that meet the criteria outlined in Article 2 who are nationals or residents of Member State/ Contracting Party to this instrument.[37]

[29]*Id.* at art. 6(1).
[30]*Id.* at art.6(2).
[31]*Id.* at art. 8(1) Option 1.
[32]*Id.* at art. 8(1) Option 2.
[33]*Id.* at art. 8(2).
[34]*Id.* at art.8(3).
[35]*Id.* at art. 9(3).
[36]*Id.* at art. 10(1) and art.10(2).
[37]*Id.* at art. 11(1).

Foreign beneficiaries that meet the criteria outlined in Article 2 are also entitled to enjoy the same rights and benefits enjoyed by beneficiaries who are nationals of the Member State/Contracting Party of protection.[38]

Article 12 and Trans-Boundary Cooperation provides that in instances where TCEs are located in territories of different Member States/Contracting Parties, the states parties are to cooperate in addressing instances of trans-boundary TCEs, with the involvement of Indigenous Peoples and local communities concerned, where applicable, with a view to implementing this instrument.[39]A regional indigenous body, set up with minimal intervention from States, could be a model for dealing effectively with Indigenous Peoples TCEs in a trans-boundary context.

Article 13 deals with capacity building and creating awareness. It makes it incumbent upon Member States/Contracting Parties to cooperate in capacity building, capacity development and strengthening of human resources and institutional capacities to effectively implement the instrument in developing countries, in particular least developed countries. In this context states/parties should facilitate the involvement of Indigenous Peoples' and local communities and relevant stakeholders, including non-governmental organizations and the private sector.[40]With a view to create this awareness and in particular to educate users and owners of TCEs of their obligations under this instrument States Parties are to take certain measures which include, promoting the instrument; organizing meetings of indigenous and local communities and relevant stakeholders; establishment and maintenance of a help desk for indigenous and local communities and relevant stakeholders; promotion of voluntary codes of conduct, guidelines and best practices and/or standards in consultation with indigenous and local communities and relevant stakeholders; promotion of, as appropriate, domestic, regional and international exchanges of experience; involvement of indigenous and local communities and relevant stakeholders in the implementation of this instrument; and awareness raising of community protocols and procedures of indigenous and local communities.[41]

IV. CONCLUSION AND SUGGESTIONS

Indigenous Peoples have a Right to Self- Determination[42] and by virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development. Indigenous Peoples have sovereignty over their resources[43] and by virtue of this sovereignty; they retain their rights over their resources even in cases of unauthorized access and when the term of legitimate use has expired. There is therefore an inherent incompatibility between the existing intellectual property regime, which is trade and market-based, and the way Indigenous Peoples view their TCEs. The Draft Article prepared by WIPO is a very good model however it may be seen that this document is not without flaws and some further suggestions may be incorporated before the Draft becomes acceptable as a binding document.

[38] *Id.* at art. 11(2).
[39] *Id.* at art.12.
[40] *Id.* at art.13(1).
[41] *Id.* at art. 13 (a) to (e).
[42] United Nations Declaration on the Rights of Indigenous Peoples, art. 3.
[43] *Available at*: http://www.un.org/esa/socdev/unpfii/documents/Report%20by%20Erica%20Irene%20A.%20Daes.pdf (last visited on May 20, 2018).

Suggestions:

1. The definition of Indigenous Peoples TCEs should be guided by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and developed by the United Nations' mandates on Indigenous Peoples rights.
2. Access to and use of TCEs requires free, informed and prior consent (FPIC) from Indigenous Peoples. Failure to obtain FPIC in accordance with the requirements of Indigenous Peoples' laws is an infringement of their intellectual property rights. TCEs are protected only when authorization of use is granted by the peoples themselves.
3. Public domain does not guarantee free use of material when it is done without proper authorization. In such situations, Indigenous Peoples' must retain their rights over their intellectual property and must be entitled to remedy.
4. National laws must be developed in full consultation with and appropriate authority from Indigenous Peoples. These laws may provide for protection of Indigenous Peoples' intellectual property rights.
5. Indigenous Peoples should have access to just and fair procedures to resolve disputes over their rights, and to effective remedies of infringement of their intellectual property rights. Such procedures and remedies shall give due consideration to the customs, traditions, rules and legal systems of the Indigenous Peoples' concerned and international human rights.
6. Indigenous Peoples own their knowledge in perpetuity and the rights over their knowledge revert to Indigenous Peoples upon expiration of the agreed term of utilization. Protection of TCEs as such shall therefore be not subject to any formality.
7. As far as trans-boundary measures are concerned, a regional indigenous body, set up with minimal intervention from States, could be an effective model for dealing with TCEs of Indigenous Peoples.

As discussed, various attempts have been made at the international, national and regional levels for the protection of TCEs. "One can see that the provisions of the Draft Articles on TCEs are more practical and operational than previous international and regional provisions relating to folklore. Although its provisions normally have two to three option provisions in each article due to representatives' different views, the Draft Articles on TCEs are still a very good model to be referenced in other countries' national laws relating to the protection of folklore."[44]

[44] *Supra* n. 9.

URGENT NEED OF LAW TO REGULATE THE SITUATIONS OF HUNG LEGISLATIVE ASSEMBLIES

*Krishna Murari Yadav**

I. INTRODUCTION

The Constitution of India provides that the Governor of a state will be appointed by the President.[1] In practice only those person can be appointed as Governor whom the Council of Ministers in Centre thinks fit. The Governor shall hold office during the pleasure of the President.[2] In case of *Ram Jawaya Kapur* v. *State of Punjab*,[3] Supreme Court said that after reading articles 53 and 74, it becomes clear that the President is a formal or Constitutional head while real head is Council of Ministers. We have witnessed that whenever Government in centre has changed, Governors appointed by previous Governments have also changed. It also happened in 2004 and 2014. The post of Governor has actually become a political post.

It is rule that Governor acts on the aid and advice of the Council of Ministers. In case of *Ram Jawaya Kapur* v. *State of Punjab*,[4] the Supreme Court said that it becomes very clear that the Governor is a formal or constitutional head while real head is Council of Ministers. We have accepted Parliamentary form of Government as in England. In *Samsher Singh* v. *State of Punjab*,[5] the Supreme Court said that "wherever the Constitution requires satisfaction of Governor under articles 213 and 356, it is not the personal satisfaction of the Governor. It is the satisfaction of the Council of Ministers in constitutional sense under the cabinet system of Government." So, from these cases it becomes very clear that actual power is in the hand of the Council of Ministers rather than the Governor.

There are certain exceptional circumstances when Governor acts according to his own discretion.[6] One of them is inviting a person to form the 'Government'. Governor has more widely discretionary power than the discretionary power of the President of India. Governor may reserve any bill for consideration of President.[7] He may also submit report for imposition of President's rule in State.[8] He may also grant sanction to prosecute a Minister, including Chief Minister under the Prevention of Corruption Act, 1988.[9] Exercise of discretion by the Governor is subject to judicial review.[10] Discretion must not be used in arbitrary and capricious manner.[11] Governor is not employee or servant of Government of India.[12]

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[1] Art. 155 of the Constitution of India.

[2] *Id.*, art. 156.

[3] AIR 1955 SC 549.

[4] *Ibid.*

[5] AIR 1974 SC 2129.

[6] *Supra* note 1 at art. 163. According to art. 163(1), there shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

[7] *Id.* at art. 200.

[8] *Id.* at art. 356.

[9] *M.P. Special Police Establishment* v. *State of Madhya Pradesh*, AIR 2005 SC 325.

[10] *B.P. Singhal* v. *Union of India* (2010) 6 SCC 331.

[11] *Ibid.*

[12] *Hargovind Pant* v. *Dr. Raghukul Tilak*, 1979 AIR 1109.

Since 1951, there is no uniformity on what the Governor should do in case of hung Assembly. Sometimes leader of largest party and sometime leader of pre /post- election coalition as convenient to Central Government is called to form the Government. This is against the federal features of the Constitution of India. Sarkaria Commission,[13] Justice M.N. Venkatachaliah Commission[14] and Punchhi Commission[15] have recommended guidelines for Governor to use discretion in case of hung Assembly and manner of appointment and removal of Governor. Floor test is mandatory to decide majority in Assembly.[16] But in absence of certain enacted laws, these guidelines and decisions have been violated.

II. APPOINTMENT AND REMOVAL OF GOVERNOR

The Governor of a State shall be appointed by the President by warrant under his hand and seal.[17]The Governor shall hold office during the pleasure of the President.[18] However, the Governor is not an agent of the President of India.[19] In India, there is Parliamentary form of Government. In this form of Government, there are two heads. One is the formal or Constitutional head and other is real head. President and Governors are formal or Constitutional heads. Real executive powers are vested in Ministers or Cabinet.[20] After observing articles 52, 53, 74 and *Ram Jawaya Kapur* v. *State of Punjab*,[21] *Shamsher Singh* v. *State of Punjab*[22] and *S. P. Gupta* v. *Union of India*,[23] it can said that real powers of the President are vested in the Council of Ministers. So indirectly power of President is used by Council of Ministers.

In the case of *Hargovind Pant* v. *Dr. Raghukul Tilak*[24], a Constitutional Bench of the Supreme Court held that Governors hold an independent constitutional office which is not subject to the control of the Government of India. They are not employee or servant of anyone. He occupies a high constitutional office with important constitutional functions and duties.

Although the Supreme Court has held that Governor is not employee or servant of anyone, but in practice his position is worst in comparison to another authority. Government Servant cannot be dismissed without being given a right of hearing, the Governor can be

[13] In June 9, 1983 the Union Government constituted a Commission under the Chairmanship of Justice R.S. Sarkaria with Shri B. Sivaraman and Dr. S.R. Sen as its members, to review the question of Centre - State relations. The Commission submitted its report in January 1988.Total pages are 1600. This report is divided into 19 Chapters. Report of Sarkaria Commission, *Available at:* http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/ (Visited on May 22, 2018).

[14] The National Commission to Review the Working of the Constitution was set up by Government Resolution dated February 22, 2000 under the Chairmanship of Justice M.N. Venkatachaliah. Main function of this Commission was to suggest best methods after observing the experience of the Constitution for past 50 years. The Commission submitted its report in two volumes to the Government on March 31, 2002.

[15] The Commission on Centre-State Relations was constituted by Government under the Chairmanship of Hon'ble former Chief Justice of India Madan Mohan Punchhi on April 27, 2007 to strengthen Centre- State Relationship after Sarkaria Commission.

[16] *S. R. Bommai* v. *UOI*, AIR 1994 SC 1918.

[17] *Supra* note 1 at art. 155.

[18] *Id.* at art. 156.

[19] H. M. Seervai, *Constitutional Law of India* 2065 (Universal Law Publishing Co. Pvt. Ltd, 1993).

[20] *Supra* note 3.

[21] *Ibid.*

[22] *Infra* note 45.

[23] AIR 1982 SC 149

[24] *Supra* note 12.

removed from office under article 156(1) without assigning any reason. Government Servants are entitled for *audi alteram partem*[25] but Governors are not entitled for this.[26]

A. Sarkaria Commission (Commission on Centre-State Relation), 1988

The Sarkaria Commission[27] has mentioned in its Report that frequent removal and transfer of Governors have lowered the dignity of Governor. Many Governors looking forward for further office under the Union or active role in politics after their tenure regard themselves as an agent of the Union.[28] The Commission had recommended that Governor should be appointed through consultation process. Only that person should be appointed as a Governor who had not participated in active politics recently.[29] Chief Minister of the State, Speaker of Lok Sabha and Vice President of India must be consulted before appointing any person as Governor. It was also recommended to amend article 155 for inserting procedure of consultation.[30] It was recommended that the Governor's tenure of office of five years in a State should not be disturbed except very rarely and that too, for some extremely compelling reason. He should be given an opportunity of hearing. He should be removed on the recommendation of an 'Advisory Group' consisting of the Vice-President of India and the Speaker of the Lok Sabha or a retired Chief Justice of India.

B. Justice M.N. Venkatachaliah Commission, 2002

This Commission is also known as National Commission to Review the Working of the Constitution.[31] This Commission suggested for constitution of a Committee comprising of the Prime Minister of India, and the Home Minister of India. It was the discretionary power of the Committee either to include Vice-President or not.

In the case of *Rameshwar Prasad* v. *Union of India*,[32] the Supreme Court left at the wisdom of political parties and their leaders to formulate national policy with some common minimum parameters applicable and acceptable to all major political parties for appointment and removable of Governor.

C. Punchhi Commission[33], 2010

Report of the Commission on Centre-State Relations is also known as Punchhi Commission.[34] This Commission recommended for amendment of article 156 and article 157 of the Constitution of India. Regarding article 156, it recommended that the phrase "during the pleasure of the President" must be substituted by an appropriate procedure so that before

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[25] *Supra* note 1 at art. 311.
[26] M.P. Jain, *Indian Constitutional Law* 359 (Lexis Nexis, 2018).
[27] Report of Sarkaria Commission, *available at:* http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/# (last visited on May 22, 2018).
[28] Report of Sarkaria Commission, Ch. IV, Role of the Governor, Para 4.1.02.
[29] This view was reiterated in case of *Rameshwar Prasad* v. *Union of India* (2006) 2 SCC 1: AIR 2006 SC 980
[30] *Supra* note 29 at para 4.16.03
[31] The National Commission to Review the Working of the Constitution was set up by Government Resolution dated 22 February, 2000 under the Chairmanship of Justice M.N. Venkatachaliah. Main function of this Commission was to suggest best methods after observing the experience of the Constitution past 50 years.The Commission submitted its report in two volumes to the Government on 31st March, 2002.
[32] AIR 2006 SC 980.
[33] The Commission on Centre-State Relations was constituted by Government under the Chairmanship of Hon'ble former Chief Justice of India Madan Mohan Punchhi on April 27, 2007 to strengthen Centre- State Relationship after Sarkaria Commission. Punchhi Commission submitted its Report in seven volumes on March 30, 2010.
[34] Report of the Commission on Centre-State Relations.

removal of Governor, he must be provided an opportunity to represent himself before President of India. The Commission was against "Doctrine of Pleasure' in case of removal of Governor.[35] This Commission was in favour of inserting some more qualifications for Governors.

The Commission recommended that the following amendments in article 157 of the Constitution are required to ensure the independence and dignity of the Governor's office:

> (i) "The Governor should, in the opinion of the President, be an eminent person;
> (ii) The Governor must be a person from outside the concerned State; and
> (iii) The Governor should be a detached person and not too intimately connected with the local politics of the State. Accordingly, the Governor must not have participated in active politics at the Centre or State or local level for at least a couple of years before his appointment."[36]

United Progressive Alliance's Government came into power after defeating National Democratic Alliance's Government in 2004. Governors of Uttar Pradesh, Haryana, Gujarat and Goa were removed on July 2, 2004. It was challenged through writ petition under article 32 by former BJP Member of Parliament, B.P. Singhal and name of the case was *B.P. Singhal* v. *Union of India.*[37]A Constitution Bench of Supreme Court of India headed by Chief Justice of India K.G. Balakrishnan stated that the Doctrine of pleasure is applicable in case of office of Governor. So, no need to assign any reasons or providing an opportunity for hearing. But such removal must not be "arbitrary, whimsical, capricious or unreasonable". This power must be exercised in exceptional circumstances on the basis of compelling reasons. If the aggrieved is able to show prima facie arbitrary or mala fide use of power, then the Court has the power of judicial review. A Governor cannot be removed on the ground that he is out of sync with the policies and ideologies of the Union Government or the party in power at the Centre. Nor can he be removed on the ground that the Union Government has lost confidence in him. It follows therefore that change in government at Centre is not a ground for removal of Governors holding office to make way for others favoured by the new government.

III. HUNG ASSEMBLY AND APPOINTMENT OF CHIEF MINISTER

Governor shall act on the aid and advice of the Council of Ministers except where Constitution requires to act according to his own discretion.[38] Chief Minister shall be appointed by the Governor.[39] Any person may be appointed as a Chief Minister although he is neither member of the Legislative Assembly nor the member of Legislative Council.[40] The reason of this is the absence of the expression "from amongst members of the legislature" in article 164(1).[41] The only condition is that he must be member of either House within six months.[42] A person disqualified to be member of either House cannot be appointed as a Chief Minister.[43]

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[35]*Id.* at para 4.4.06.
[36]*Id.* at Para 4.4.11.
[37]*Supra* note 10.
[38]*Supra* note 1 at art. 163 (1).
[39]*Id.* at art. 164 (1).
[40]Durga Das Basu, *Shorter Constitution of India* 1098 (Lexis Nexis, 2009).
[41] P M Bakshi, *Commentary on the Constitution of India* 532 (Lexis Nexis, 2016).
[42]The Constitution of India, art. 164 (4); see also, *S. R. Chaudhari* v. *State of Punjab,* AIR 2001 SC 2707.
[43]*B.R. Kapoor* v. *State of Tamil Nadu*¸ AIR 2001 SC 3435.

Hon'ble Justice Krishna Iyer observed that "Governor has discretionary power in the choice of Chief Minister, this choice is restricted by the paramount consideration that he should command a majority in the House".[44] The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.[45]

In the Constitution of India, it has not been written that only that person can be appointed as a Chief Minister who has majority in Legislative Assembly. It has also not been written that the Governor has power to call the Chief Minister to prove majority in the Assembly. These questions were raised before the Patna High Court when Governor after appointing Smt. Rabri Devi as the Chief Minister directed her to prove majority in the Legislative Assembly within 10 days.[46] This direction was given on March 9, 1999 and at that time the National Democratic Alliance was in power in the Centre. In the Case of *Sapru Jayakar Motilal C.R. Das* v. *Union of India*[47], Patna High Court with the help of *Shamsher Singh case*[48] and *U. N. R. Rao case*[49] decided these questions. In *Shamsher Singh Case* it has been held that India has accepted Parliamentary form of Government. In the case of *U. N. R. Rao,* it was contended that convention prevailing in United Kingdom must be ignored. Supreme Court rejected this argument and held that in absence of clear provisions 'conventions' before the commencement of the Constitution may be adopted. In this case Hon'ble Chief Justice of India S. M. Sikri stated:

> "If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with, a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed."[50]

The Patna High Court had invoked two constitutional features to support that Governor has power to call for floor test, viz., (1) Collective Responsibility of the Council of Ministers to the Legislative Assembly of the State, and (2) Discretionary nature of the Governor to appoint the Chief Minister. In this case Hon'ble Justice B P Singh said:

> "To us it appears that even if the Constitution does not refer in express words to a vote of confidence, or to a vote of no confidence, the principle of collective responsibility of the Council of Ministers to the legislative Assembly includes within its ambit the rule that the Council of Ministers must enjoy the support of the majority of members of the Legislative Assembly."

The Supreme Court in several cases has said that floor test is best methods to judge the majority in Assembly.[51]

From the above discussion it has become very clear that only that person may be appointed as a Chief Minister who is able to prove majority in Legislative Assembly of the

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[44]*Shamsher Singh* v. *State Of Punjab,* AIR 1974 SC 2129
[45]*Supra* note 1 at art. 164 (2).
[46]*Sapru Jayakar Motilal C.R. Das* v. *Union of India,* AIR 1999 Pat 221.
[47]AIR 1999 Pat 221.
[48]*Supra* n. 45.
[49]*U. N. R. Rao* v. *Smt. Indira Gandhi,* AIR 1971 SC 1002.
[50]*Ibid.*
[51]*S. R. Bommai*v. *Union of India,* AIR 1994 SC 1918, *Rameshwar Prasad* v.*UOI,* AIR 2006 SC 980 and *Nabam Rebia, & Bamang Felix* v. *Deputy Speaker* (2016) 8 SCCC 1.

State and relevant conventions before the commencement of the Constitution may be adopted for interpreting relevant provisions of the Constitution of India.

When a single largest party or pre-poll coalition of parties has not secured majority in Legislative Assembly that is called hung Assembly. Several committees and Commissions have made suggestions regarding appointment of Chief Minister in case of hung Assembly which are following:

A. The Governors' Committee (Bhagwan Sahay Committee) Report, 1971

This Committee suggested the following formula to appoint a person as a Chief Minister:

(i) "Where a *single party commands a majority* in the Assembly, the Governor is to call upon its leader to form the government.
(ii) *If before the election,* some parties combine and produce an agreed programme and the combination gets a majority after the election, the commonly chosen leader of the combination should be invited to from the government.
(iii) If no party is returned in a majority at the election and, thereafter, two or more parties come together to form the government, the leader of the combination may be invited to form the government.
(iv) The leader of a minority party may be invited to form the government if the Governor is satisfied that the leader will be able to muster majority support in the House."[52]

B. Sarkaria Commission, 1988

In choosing a Chief Minister, the Governor should follow the following principles in accordance with preference:

(i) "The party or combination of parties which commands the widest support in the Legislative Assembly should be called upon to form the Government.
(ii) An alliance of parties that was formed prior to the elections.
(iii) The largest single party staking a claim to form the government with the support of others, including "independents".
(iv) A post-electoral coalition of parties, with all the partners in the coalition joining the Government.
(v) A post-electoral alliance of parties, with some of the parties in the alliance forming a Government and the remaining parties, including "independents" supporting the Government from outside."[53]

The basis of political convention in England in forming a ministry is that the King's Govt. must go on, and that the party which commands the widest support in the House of Commons must be called upon to form the government.[54]In some States, the Governors had invited the leader of the single largest party to form a ministry and ignored the claim of the leader of a united front and vice-versa. The author has tried to show position of hung Assemblies and discretionary powers used by the Governors through Chart. This Chart clearly shows that behaviour of Governors is directly or indirectly influenced by the then Central Government.

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[52]*Supra* note 27at 378.
[53] Report of Sarkaria Commission, Chapter IV, Role of the Governor, Para 4.11.04, *Available at:* http://interstatecouncil.nic.in/wp-content/uploads/2015/06/CHAPTERIV.pdf (last visited on May 22, 2018).
[54]*Supra* note 20 at 2063.

Chart

States/ Years	Single Largest Party	Coalition of Parties	Invitation by Governor	Central Government
Madras/ 1952	Congress 152 seats	UDF (Post-poll Coalition) (166 Seats)	Single Largest Party (Congress 152 seats) (This was the first case when there were severe allegations that majority was proved by horse-trading). [55]	Congress
Haryana/ 1982	Congress (I) 35 Seats	Lok Dal-BJP 36 Seats	Single Largest Party Congress (I) 35 Seats[56]	Congress
Bihar/ 2005	JD(U) and BJP formed coalition to form government (92 seats)	RJD 75 seats	When JD(U) and BJP tried to form the Government, Assembly was dissolved even without single sitting.[57]	UPA
Goa/ 2017	Congress 17	BJP 13 and Other Parties	Coalition (BJP 13 and Other Parties)	NDA
Manipur/ 2017	Congress 28	BJP 21 and Coalition	Coalition	NDA
Meghalaya/ 2018	Congress 21	BJP 2 and Coalition	Coalition	NDA
Karnataka/ 2018	Congress and JDS Coalition 117 seats	BJP 104	Largest Party BJP (104 seats) (15 Days time was given by Governor for floor test which was reduced up to 30 hours by the Supreme Court).[58]	NDA

IV. CONCLUSION AND RECOMMENDATIONS

Federal character is the basic structure of the Constitution of India.[59] To protect the federal features of the Constitution of India, an independent Governor is *sine qua non* who

[55]Gautam Bhatia, "Do we need the office of the Governor?" *The Hindu*, May 24, 2018.

[56] Dr. J.N. Pandey, *Constitutional Law of India* 592 (Central Law Agency, 2015).

[57] In the case of *Rameshwar Prasad* v. *Union of India*, AIR 2006 SC 980, Supreme Court declared that dissolution of Assembly by Governor was unconstitutional. Coalition must be given an opportunity for floor test.

[58] Regarding Karnataka Dispute, three "Orders" were passed on 17, 18 and 19 May, 2018. All the three orders were passed in case of *Dr. G. Parmeshwara & Anr.* v. *Union of India*. These Orders were passed by three Judge Bench – Hon'ble JJ A. K. Sikri, S. A. Bobde and Ashok Bhushan. Case Diary No. of this case is 19482/2018.
(1) First Order -Midnight Order (2.00A.M, May17, 2018) - Order passed on 17 May is called midnight order by which Supreme Court passed an order to produce document but did not prohibit swearing ceremony of Mr. Yeddyurappa which was scheduled at 9.30 a.m. on 17th May, 2018 and fixed the date of next hearing on May 18, 2018.
(2) Second Order - Order passed on May 18, 2018- In this Order the Supreme Court passed guidelines for floor test at 04.00 p.m. on May 19, 2018. It also directed for appointment of pro-tem Speaker.
(3) Third Order - Order passed on May 19, 2018- Additional Solicitor General on behalf of Karnataka Government promised for live telecast and permission for media for coverage of floor test. The Supreme Court passed an order that that no further order for removing Mr. K.G. Boppaiah, pro-tem Speaker. It means appointment of pro-tem speaker was approved.

[59]*Kesavananda Bharati* v. *State of Kerala*, AIR 1973 SC 1461.

can use his discretion according to the Constitutional ethos rather than political partisan. Since the commencement of the Constitution, behaviour of Governors is based on political partisanship. Such behaviour of Governors is heart wrenching for thinkers and catastrophe for the Constitution. Governor is neither an employee nor an agent of the President of India. Governor is appointed by President on the advice of the Council of Ministers. Crucial role of Government in appointment and removal of Governor makes the Governor political agent. Since Madras (1952) to Karnataka (2018), Governors have acted like political agents of ruling party/ parties and role of Governors has always been controversial since inception. Several Committees and Commissions have suggested several formulae for appointment and removal of Governors and use of discretionary power by them. The Supreme Court of India has also suggested for floor test and use of discretionary power. "*Miseraestservitus, ubi jus estvagumautincertum*" which means "it is a miserable slavery where the law is vague or uncertain". So it is urgent need of law to enact particular law so that an eminent and independent person may be appointed as a Governor to protect federal character of the Constitution of India. Role of fair media and unbiased social media which create political awareness cannot be denied. Some of the recommendations in this context are:

(1) Tenure of Governor must be certain like other Constitutional bodies namely, President, Comptroller of Auditor General, Judges. His tenure totally depends upon pleasure of the President who removes him/her without assigning any reason. Indirectly tenure of Governor depends upon the sweet will of ruling party in the Centre. He should not be removed without assigning any reason and giving an opportunity for hearing.

(2) Wider and arbitrary discretionary powers of Governor are against representative form of Government. Such discretionary powers must be curtailed by amending article 163 in the line of article 74.

(3) There is need to amend article 164 and insert guidelines to decide which party or person should be invited to form Government and manner for proving majority in the Assembly. There are following rules that must be followed in preference at the time of appointing a person as Chief Minister-

Rule 1- Only that party or pre-poll combination of parties must be invited which has secured absolute majority in the Assembly.

Rule 2- In case of non-fulfillment of first rule, largest single party in Assembly election must be invited to form Government.

Rule 3- In absence of first and second rule, post-poll combination of parties which are claiming majority in the House must be invited to form Government.

Rule 4- Floor test must be followed to prove majority in the House.

(4) Article 156 (1) must be amended and phrase 'pleasure of President' must be omitted.

(5) Article 155 and article 156 must be amended and 'National Governors Appointment and Removal Commission' (NGARC) consisting of Prime Minister of India, Home Minister of India, Speaker of Lok Sabha, Chairperson of Rajya Sabha, Leader of Opposition and Chief Minister of the State in which Governor is to be appointed must be inserted. For appointment of any person, at least four members of the Committee must agree.

(6) Article 157 must also be amended and the following qualifications must be inserted –

(i) he must be an eminent person, (ii) he has not actively participated on behalf of any party during last five years. (iii) his previous record must be beyond political partisanship.

THE DENIED RIGHTS AND ENDANGERED IDENTITIES: INDIAN APPROACHTOWARDS ROHINGYAS AMIDST HUMANITARIAN CRISIS

*Ajay Sonawane**

'India does not want to become refugee capital of the world',[1] the sovereign India's government responded in Apex Court while dealing with multipronged issue concerning deportation of Rohingya people who have sought shelter in India fearing the prolonged persecution in native Myanmar. According to scholars, the stand taken by government is in paradox with our millennium old principle of '*Vasudhaiva Kutumbakam*' and '*Atithee Devo Bhava*' which we as a cradle of civilization and as an independent constitutional democracy have practiced since long time.

The slowly emerging human rights crisis of Rohingyas was suddenly in news since last few years due to aggravated conditions and rising violence in the state of Myanmar. It is not the first time that humanity faced such mass scale violence against specific community or section of people but the nature and ramifications out of this Rohingya crisis is certainly posing different challenge to human rights regime. In order to trace enduring solution, it becomes essential to unearth the roots of problem, thus causative factors of Rohingya crisis need to be traced.

The Rohingyas are a minority group practicing Islam and residing in the Rakhine state of Myanmar. They claim close ties with Rakhine state and have distinctive language and culture. The State of Myanmar Myanmar has never accepted their affinity to the land and the Rohingyas are treated as illegal immigrants and the laws of Myanmar rendered them as stateless entities. The non-recognition of Rohingya led to their civil and political deprivation and this further formed ground for frequent clashes between majority Buddhist community and minority Rohingyas. Recently in 2012 communal violence erupted on account of criminal incident in one of the villages of Rakhine state. This led to large scale exodus of the Rohingya people to neighbouring countries like India, Bangladesh, Malaysia, Thailand and Indonesia. The Rohingya people migrated to seek safe shelter and this entire process gave rise to Asia's one of the largest refugee crisis.

The crisis needs to be observed meticulously through multiple micro and macroscopic lenses to point out the real reasons for such large scale human rights violations that are termed as Asia's largest mass exodus in modern era. Following are the causes of this humanitarian crisis:

(i) No civil, political and legal recognition: There are numerous complex causative factors of this crisis those are rooted in cultural, national, political, economic and military aspects among them lack of Rohingya's citizenship is the fundamental root cause. The 1982 Citizenship Law which is at the root of crisis is a flawed and discriminatory piece of legislation, it recognizes nationality on the basis of race

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[1]Krishnadas Rajagopal, "Don't want India to become refugee capital of the world, govt tells SC", available at: https://www.thehindu.com/news/national/dont-want-india-to-become-the-refugee-capital-of-the-world-govt-to-sc/article22608096.ece (last visited on Apr.23, 2018).

and ethnicity.[2] The Act denies the Rohingya Muslims citizenship of Myanmar state though the community is living there for generations. This legislation leads to stateless condition of minority Rohingya people. Also, ethnic cultural conflicts, minority versus majority tussle, economics behind discriminatory politics and Myanmar's deliberate political landscape favouring majority etc. are other evident reasons which need to be considered cumulatively to trace the nature and gravity of issue.

(ii) Identity clashes, communal-ideological conflicts: Asian region, specifically South Asian and East Asian region encompasses world's largest array of religious, ethnic and linguistic groups. More the identities, more is the probability of identity clashes and emergence of violence triggered by socio-economic-politico-cultural differences; this creates threat to social order and harmony. Similarly, the roots of Rohingya crisis are deeply embedded in the socio-cultural and political history of Myanmar and adjoining region. Myanmar officially recognizes 135 ethnic groups, each group having its own distinctive language and culture. Each group had history of autonomous self-governance both before and during the colonial period. The clashes between majority Buddhist community and minority Islamic community in Rakhine state is the prime reason for this crisis.

(iii) Political turmoil, lack of democracy and effect of military rule: The political turmoil in Myanmar leading to conflict and communal violence is decades old problems, inability and lack of legitimacy of successive military regimes to uphold the address contested visions of what constitutes the nation state among the country's ethnic groups and political factions. Myanmar witnessed decades of authoritarianism through military rule, caused founded on authoritarian and biased structure of governance, this led to brutal suppression of democracy movements and ethnic autonomy, consequently resulted in protracted armed conflicts between government security forces and ethnic armed organizations. The militant elements of Rohingya that emerged as a response to prolonged persecution and discrimination is another reason that underlines the failure or inefficiency of governments and governance structure in Myanmar. After studying the Myanmar's ethnic turmoil in absence of rule of law and socio-legal order it can be deduced that 'absence of constitutional democracy and constitutionalism giving rise to violence is a threat to human rights.

(iv) Resource scarcity and Economic factors: Rakhine is one of the poorest states in Myanmar, it has limited access to basic services and livelihood opportunities for the entire population. The tussle for securing opportunities and obtaining basic economic security leads to intense competition, this economic aspect in turn affects social-political policy. The less developed Rakhine land thus became fertile ground for ethnic clashes and extreme atrocities. Economy paves way to prosperous civilization and polity, hence the economical angle of this issue needs to be addressed properly. The complex causative factors of this crisis are rooted in cultural, national, political, economic and military aspects among them lack of Rohingya's citizenship is the fundamental root cause. Also, ethnic cultural conflicts, minority v. majority tussle, economic behind discriminatory politics and Myanmar's deliberate political landscape favouring majority etc. are other evident reasons as discussed above. After studying the causes of Rohingya crisis it can be

[2] The Citizenship Law of Myanmar, 1982, available at: http://un-act.org/publication/myanmars-citizenship-law-1982/ (last visited on Apr.23, 2018).

ascertained that the persecution and atrocities of minority community over the decades has increased or spurred like a social cancer that is killing the spirit of humanity and laws strengthening human rights as well.

In the words of Hobbes, the political philosophy should be grounded on the principle of 'self-preservation' which is everyone's fundamental natural instinct. Considering this aspect fleeing from one territory to another for avoiding persecution and securing survival is in line with natural law and natural instinct. On one hand, the municipal law of any state targets refugees as 'illegal migrants' but on other hand *jus Naturale* and International Refugee Law treats them as victimized human group. Thus, the crisis suffered by Rohingya should also be viewed as convergence as well as divergence between National- International Law. The humanitarian turmoil in Rakhine is "a textbook example of ethnic cleansing," as called by UN High Commissioner for Human Rights.[3] The state sponsored atrocities have long history of discrimination against the ethnic Muslim minority group. The ongoing affair emerged out of fierce clashes between minority Muslims and dominant Buddhist community. The Rohingya minority forms about 2 percent of the Myanmar's population and one third population of Rakhine State. It stands to be 'most persecuted minority across the globe,' disenfranchised to vote in elections, oppressed by majority Rakhine Buddhists, left helpless by State as 'illegal migrants' to become stateless and grapple with identity and existence crisis.[4] United Nation's Human Rights investigators reported that army of Myanmar committed 'crimes against humanity.'[5] However, the leader of Myanmar Aung San Suu Kyi denied these findings, her deliberate silence on such undemocratic inhumane incidents raises question on credibility of new democratic government of Myanmar.

Theory concerning 'multiculturalism of fear' propounded by Jacob Levy holds that "failure on the part of national governments across the world to protect minority rights might also exacerbate ethnic and cultural tensions between majorities and minorities and consequently gives rise to the splintering of political communities."[6] There is a strong nexus between ethnic rights of varied communities across the world and political stability which culminates into global peace. This theory answers the prominent questions like; Why it is indispensable to protect minority rights? What should be the ideology behind creating safe ground for minority community? Why International Law values minority protection? The theory further hold that beyond reason of universal value minority rights must be protected because "it mitigates dangers of violence, cruelty, and political humiliation that so often accompany ethnic pluralism and ethnic politics." Thus the theory of multiculturalism of fear explicitly throws light on the significance of maintaining harmony ethnic groups and upholding the mosaic structure as such.

The Rohingya community has been subjected to four stages; stigmatization, harassment, isolation and the systematic weakening of civil right which forms 'process of genocide' and leads to catastrophe of ethnic cleansing.[7] Thus, at present this community is facing the storm of ethnic cleansing. The right of self-determination, right to preserve distinctive identity and ethnic culture, autonomy and the equitable sharing of power and

[3] UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar, *available at*: https://news.un.org/en/story/2017/09/564622-un-human-right-chief-points-textbook-example-ethnic-cleansing-myanmar (last visited on Feb.23, 2018).

[4] Human Rights Watch on Rohingya Crisis available at https://www.hrw.org/tag/rohingya-crisis (Last visited on Feb. 20, 2018)

[5] *Supra* n. 1.

[6] Jacob T. Levy, *The Multiculturalism of Fear* 12 (Oxford Univ. Press 2000).

[7] Penny Green, *et.al.,* Genocide Achieved, Genocide Continues: Myanmar's Annihilation of The Rohingya, *available at:* http://statecrime.org/data/2018/04/ISCI-Rohingya-Report-II-PUBLISHED-VERSION-revised-compressed.pdf (last visited on Feb.23, 2018).

resources for attaining right to development, right to health, right to education, right to social security and many more such valuable human rights of Rohingyas are constantly subverted. The nations that are looking for prosperous and sustainable world should not forget that the society that undermines inherent basic human rights of an individual is an infertile land for civilization and development.

There is a challenge of balancing moral-humanitarian obligation of providing assistance to refugees versus maintaining internal security of the state. The stand of Government of India in Apex Court underlines security concern. The State receiving influx of refugees or migrants face problem of resource burden, cultural clashes, threat of crimes and terrorism, demographic imbalance, concern of security and integrity of nation.

The stakeholders involved in resolution of crisis should not forget that the nations those stand with independent political identities at present were part of same territory under some or another rule. Thus, there lay antecedents of brotherhood in common history, culture and political movements. Considering this the existing strong states have moral responsibility to extend humane hand of assistance to fragile states undergoing such sort of crisis. This can be termed as principle of past identity and present brotherhood.

The International human rights laws set out obligations for the States "to promote and protect human rights and fundamental freedoms of individuals or groups." "International human rights law comprises a variety of sources and instruments, including the Universal Declaration of Human Rights, various international and regional treaties, principles of customary international law, and general principles of international law. These sources and instruments provide minorities with several avenues for challenging the exercise of state power."

Some of the international law provisions which deal with this crisis like statelessness or refugee crisis have been discussed here. The most basic instrument that enshrines human rights values is Universal Declaration of Human Rights, but UDHR makes no explicit mention of minority rights as such. However, Article 2 of the Universal Declaration of Human Rights provides that "States are required to protect and respect the human rights of all, without distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The International Covenant on Civil and Political Rights (ICCPR), an important instrument of International law refers explicitly to minorities, but it frames minority rights in primarily individualistic terms. Article 27 of the ICCPR specifically provides for the rights of minority: "In those States in which ethnic, religious and linguistic minorities exist, persons belonging to such minorities shall not be denied the right, n community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[8] The rights of children belonging to Rohingya community is at stake due to mass exodus and consequent statelessness; here comes into light the Convention on the Rights of the Child to which Myanmar is a signatory. This convention states that, from birth, every infant has the right to a nationality. The Genocide Convention 1948 also provides for protection of national, ethnical, racial or religious minority. Further, the Refugee Convention in Article 33(1), provides for Principle of non-refoulment to which any state receiving refugee or stateless people has to abide with conviction. The Article provides that "no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

[8]International Covenant on Civil and Political Rights, G.A. Res., 2200A (XXI), preamble, 21 U.N. GAOR, Supp. No. 16, U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171 (entered into force Mar. 23, 1976

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

The European Court held that; in case of extreme competitive atmosphere and ethnic clashes due to cultural differences or resource crunch etc. removal of the cause of tension by eliminating pluralistic culture is not the fair and sustainable solution, but international community must ensure that the competing groups or communities should tolerate each other.[9]

Also, international organisations like UNHCR, UN Security Council, UN General Assembly, etc. should intervene responsibly to ensure generating international pressure on government of Myanmar for stopping atrocities, providing citizenship, land of their origin and making the laws regulating/preventing arbitrary actions of Myanmar military against the community, creating viable socio-economic and political conditions for secure survival of minority. The International community and United Nation must build strong accessible mechanism to intervene and aid in case of such humanitarian crisis. The resistance on the part of Myanmar government to cooperate with intervention of UN was worrisome situation as it delays the response and mitigation process.

It is also important to strengthen practice and implementation of international laws and instruments as a move to prevent crimes against humanity. As far as Indian practice is concerned the non-accession ratification of International Convention on Refugee does not limit practice of underlying legal principles. This can be traced from the fact that India is host to many refugee communities- Jews, Sri Lankan Tamils, Afghan refugees, Bangladeshi refugees, Tibetan refugees, Chakma and Hejong tribes, etc, since centuries. Rather despite the resource burden India has set example by adhering to principle of non-refoulement. The Refugee law of India can be traced to municipal laws, stemming from provisions under Article 21 and Article 51 of the Constitution, also the statutes like Registration of Foreigners Act 1939, the Foreigners Act 1946, the Foreigners Order 1948, the Passports Act 1967, and the Illegal Migrants (Determination by Tribunals) Act 1983 deals with refugee crisis. It is on the basis of these provisions that applications for asylum by refugees are determined. Indian practice of international law is of dualist pattern to international law, and so adheres to "international law principles only insofar as they are incorporated into domestic law."

It is essential to uphold "the right to seek and to enjoy in other country asylum from persecution," as set forth in Article 14 of the Universal Declaration of Human Rights. The commitment of the international community to ensure to all persons the enjoyment of human rights should go beyond regional political interests by diluting political boundaries and extending human rights. This is quintessential for existence of fearless and peaceful coexistence of world community.

The solution such mass scale problem needs continued cooperation among national-international stakeholders. International community and group like ASEAN should come forward to build pressure on Myanmar and mobilise resources to the sites of crisis so as to resolve tension and bring enduring solutions. The recently signed pact between Myanmar and Bangladesh over Rohingya repatriation is positive move in this direction.

Human rights or refugee rights should not be strictly based on mere identity documents considering the circumstances in which people flee that does not allow them to avail or carry such identity documents; by the virtue of being human every individual inherits

[9] *Serif* v. *Greece*, Eur. Ct. H.R. 73 (1999).

right to life, survival and self-preservation. The receiving state should establish recognition mechanism for such refuge seeking people.

The governments of stable and advanced democracies like India must raise voice on international platforms to enable Myanmar government for stopping atrocities, providing citizenship, land of their origin and making the laws regulating/preventing arbitrary actions of Myanmar military against the community, creating viable socio-economic and political conditions for secure survival of minority. Moreover, the attempt should be "to eradicate discriminatory impact of those laws, particularly on minorities and women, and their lack of compliance with Myanmar's human rights obligations." It is also crucial "to bring the Citizenship Law of 1982 into line with international standards, particularly by revising discriminatory provisions that provide for the granting of citizenship on the basis of ethnicity or race."

To resolve the crisis, we need to practice the minimum humanitarian morality, that is without ensuring safety and means of rehabilitation of Rohingya's, India should not deport them to the native country. The diplomatic way of resolving refugee crisis should be focused by bringing constructive dialogues, interactions and resolutions to solve the issue. The Chinese intervention in this regard can be noticed though it was backed by economic interests. Also, India's financial assistance to Myanmar for establishing rehabilitation infrastructure in Rakhine state is commendable and required move that underlines our commitment to human values, human rights and international laws. Further, sovereign governments and international organs should act collaboratively for creating viable solutions to prevent such crimes against humanity. The modern techniques of administration and use of technology in streamlining recognition of refugee and conferring them identity documents to monitor law and order conditions can also be looked as part of solution mechanism. No refugee should be repatriated without ensuring strong robust monitoring on ground. To summarise, the crisis needs to be addressed on four fronts, cultural-regional, political, economic and humanitarian. In the words of Ravindranath Tagore:

We should strive to create the world
'which is not broken down into fragments...
where the mind is without fear and the head is held high...'

CONSTITUTIONALITY OF MARITAL RAPE: A CRITICAL ANALYSIS

Deepa Babbar[*]

The recent judgment of Supreme Court of India in the landmark judgment of *Independent Thought* v. *Union of India*[1] (Hereinafter "Independent Thought case") has decided that "sexual intercourse whether consensual or non-consensual by the husband with his wife aged between 15 years to 18 years shall be punishable as rape."

I. WHAT IS "RAPE"?

The word 'rape' has been derived from Latin term "Rapio" which literally means "to seize". Rape is "forcibly ravishing a woman against her will or without her consent". As per Merriam-Webster dictionary meaning of the term 'rape' is "unlawful sexual activity and usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is beneath a certain age or incapable of valid consent because of mental illness, mental deficiency, intoxication, unconsciousness, or deception".

Section 375 of Indian Penal Code, 1860[2] (hereinafter "IPC") has defined the term 'Rape.' As per this definition, the following constitutes rape -

1. Sexual intercourse with any woman without her will or consent (non-consensual sexual intercourse).

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[1] *Independent Thought* v. *Union of India*, W.P. (Civil) No. 382 of 2013 (decided on 11th October 2017 by Division Bench consisting of Madan B. Lokur and Deepak Mishra JJ).

[2] "375. Rape- A man is said to commit "rape" if he—

a. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

b. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

c. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

d. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

2. Sexual inter course with a girl less than 18 years with or without her consent (statutory rape).
3. If a woman is less than 15 years then sexual inter course by her husband with or without her consent will constitute rape.
4. Exception 2 appended to section 375 lays down an exception for sexual intercourse by the husband with his wife between15 years and 18 years.
5. Sexual intercourse by husband with wife even though all the ingredients of section 375 are being fulfilled is not rape (Marital Rape).

The last two circumstances stated above are those in which the offender is not liable to be penalized for the offence of rape although it satisfies the conditions laid down in section 375 IPC just because the victim and the offender are related through matrimonial ties, i.e. rape within the boundary of marriage by husband of his wife also known as marital rape.

The term 'marital rape' is not defined by our legislature as sexual intercourse by husband with his wife without her consent is not considered an offence in the Indian legal system. However, on perusal of definition of rape given under section 375 IPC 'Marital Rape' can be defined as non-consensual sexual intercourse by husband with his wife; it may involve actual use of force, threat of force or by resorting to physical violence.

In Indian patriarchal system the condition of woman is worse. We still follow the 17th Century Common Law Principles when women were considered nothing more than a chattel, they were their father's property before marriage and after marriage the husband was considered their owner; once they are married they had no right to say 'No' to their husband if he wants to enjoy her company. It comes forth from the statement of Sir Matthew Hale Chief Justice in England that: "*The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.*"[3]

Section 375 of IPC lays down that "sexual intercourse by a man with a girl under the age of 18 years (with or without her consent)" constitutes statutory rape. To analyze the concept of statutory rape we have to know on what basis such distinct offence is made. It is well known fact that a minor is considered by law an incapable entity so as to decide for himself or herself what is in his/her best interest. So, law has taken this responsibility on its own shoulders. Legislature has enacted various laws and from the time of Privy Council till now the courts in India are also taking care of the interest of a minor. The term 'child/ minor' is defined in various statutes; in case of a girl every statute deems a girl under the age of 18 years as a child.[4]The law is duty bound to protect the interest of a child under 18 years of age. Hence section 375 sixthly penalizes sexual intercourse with a girl who is below 18 years of

[3] Matthew Hale, "History of the Pleas of the Crown", 1 *Hale PC* 629 (1736). See further, S. Fredman, *Women and the Law* 55-57 (OUP, 1997).

[4] The Child Marriage Restraint Act, 1929 was repealed by the Prohibition of Child Marriage Act, 2006 and this Act defines a child as follows: "2. Definitions.—In this Act, unless the context otherwise requires,— (e) "child" means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. Under the Protection of Women from Domestic Violence Act, 2005, a child has been defined under Section 2(b) to mean any person below the age of 18 years; Section 3 of the Majority Act, 1875 provides that a person shall attain the age of majority on completing the age of 18 years and not before." It would, however, be pertinent to mention that Section 2 of the Indian Majority Act contains a non-obstante clause excluding laws relating to marriage, divorce, dower and adoption from the provisions of that Act. Under Section 4(i) of the Guardians and Wards Act, 1890,"a minor has been defined to mean a person, who has not attained majority under the Majority Act". Under Section 4(a) of the Hindu Minority and Guardianship Act, 1956 a minor has been defined to mean "a person who has not completed the age of 18 years". Under the Representation of the People Act, 1951, "a person is entitled to vote only after he attains the age of 18 years".

age. But by virtue of Exception 2 to Section 375 of the IPC, if a girl child between 15 and 18 years of age is married, her husband can have consensual or non-consensual sexual intercourse with her, without the fear of being prosecuted for the offence of rape, just because such minor child happens to be his wedded wife. Such girl child loses her right to bodily integrity and to refuse to have sexual intercourse with her husband because IPC takes away this right from her.

It is often argued that such provision is kept on our statute books so that the institution of marriage can be saved. But the people who give this argument don't understand the fact that institution of marriage cannot be disturbed just by not giving the right to the husband to have sexual intercourse with his wife without her consent. The bond of marriage becomes strong when both the partners have equality in making the choices of their personal lives. If one partner is given preference over the other then the institution of marriage becomes weak. This can definitely lead to disturbing the institution of marriage. Another justification often raised is that because the girl child got married, she gives consent either expressly or impliedly, to have sexual intercourse with her husband. This justification in itself sounds absurd as on the one hand law says that a child under the age of 18 years is incapable of giving consent to sexual intercourse in case she is unmarried, so needs protection at the hands of law; hence the law penalize such act by virtue of section 375 sixthly of IPC and on the other hand it says if such girl child is married then she acquires that level of maturity that she is capable of giving free consent to have sexual intercourse with her husband. No objective seems to have achieved by keeping such a retrogressive provision on our statute books per-se; just because a girl child between 15 and 18 years of age is married, she does not cease to be a child or attain the capacity to consent for sexual intercourse. Hence, "Exception 2 to Section 375 of the IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children."[5]Moreover, it amounts to an unreasonable classification being made between girls under the age of 18 years only on the basis of their marital status and their right to life and personal liberty is also violated by not providing her the freedom to make choices as to her own body. Hence, it needs to be wiped out of the statute books.

II. Conflict Between Various Laws Applicable in India

India is a multi-religious country. All the citizens of India in matters of Marriage, Divorce and Succession are governed by laws of their respective religion. For the purposes of application of Hindu Laws every person is Hindu if he is not Muslim, Christian, Parsi or Jew by religion.[6] Hindu law under section 5 lays down five essential conditions for a valid Hindu Marriage. It says that two Hindus can marry each-other if they don't have a spouse living, they are in fit state of mind, the bride is above 18 years of age and the groom is above 21 years of age and they are not related to each-other within the degree of prohibited relationship or in *sapinda* relation.[7]

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[5]*Supra* note 1.

[6] Hindu Marriage Act, 1955, s. 2.

[7]*Id.*, s.5. "Condition for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party,- (a) is incapable of giving a valid consent of it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity or epilepsy;

(iii) the bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of the marriage;

If a marriage is solemnized in contravention of condition of bigamy, degree of prohibited relations and sapinda relation then such marriages are void *ab initio* by virtue of section 11of Hindu Marriage Act, 1955 (Hereinafter "HMA").[8] Whereas section 12(1)(b) HMA[9] provides if a marriage is solemnized in contravention of section 5(ii) HMA then such marriage is voidable and the parties to the marriage can go to the court and get their marriage annulled. But if the condition as to the age of bride and groom given in section 5(iii) HMA is violated then such marriage is neither void nor voidable as per HMA rather such marriage is perfectly valid marriage. Even if a child marriage is solemnized, which is prohibited by law and punishable, it does not invalidate the marriage until the parties to such union ask for its dissolution. Such a situation is called factum valeti.e. something prohibited by law but if done the act does not become invalid but stays valid. However, in such a marriage two consequences are provided in the form; (i) right to divorce under section 13 (2) (iv) HMA[10] to the minor girl wherein she can repudiate such marriage after attaining the age of 15 years till she attains the age of 18 years and (ii) section 18 HMA[11] which punishes the person with one year of imprisonment or with fine upto one lakh rupees or with both.

In Muslim law also if a girl is given in marriage during her minority, her marriage is valid. But Dissolution of Muslim Marriage Act, 1939 gives her a right to get such marriage repudiated after she attains the age of 15 years but before she turns 18.

Section 3(1) of the Prohibition of Child Marriage Act, 2006 (hereinafter 'PCMA') says that a child marriage is voidable at the option of the party who was minor at the time of such marriage.[12] Though PCMA makes child marriage voidable it has been made an offence and provides punishment for contracting child marriage. Section 9 of PCMA[13] provides punishment for the groom if he is above 18 years of age and marries a girl under 18 years of

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(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two; (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two"

[8] *Id.* , s.11. "Nullity of marriage and divorce- Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v), s. 5."

[9] *Id.,* s. 12. "Voidable Marriages.-(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-
(a) that the marriage has not been consummated owing to the impotency of the respondent; or
(b) that the marriage is in contravention of the condition specified in clause (ii) of s. 5; or …"

[10] *Id.,* s.13(2)(iv). "A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years."

[11] *Id.,* s. 18. "Punishment for contravention of certain other conditions for a Hindu marriage.- Every person who procures a marriage of himself or herself or to be solemnized under this Act in contravention of the conditions specified in clauses (iii), (iv), and (v) of s. 5 shall be punishable- (a) in the case of a contravention of the condition specified in clause (iii) of s. 5, with imprisonment which may extend to one year, or with fine which may extend to one lakh rupees, or with both"

[12] S. 3(1) of PCMA:"Child marriages to be voidable at the option of contracting party being a child.— Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage: Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the district court only by a contracting party to the marriage who was a child at the time of the marriage."

[13] *Id.,* s. 9. "Punishment for male adult marrying a child.—Whoever, being a male adult above eighteen years of age, contracts a child marriage shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both."

age. Section 10[14] provides for punishment for any person who conducts, abets or perform such child marriage. Section 11[15] provides punishment for those who promote or permit solemnization of child marriage. In all these cases punishment is rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees. Section 14[16] provides that if a child marriage was injuncted by jurisdictional judicial officer and the marriage was still performed then such child marriage shall be void.

Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO') in its statement of objects and reasons states that the National Crime Record Bureau data indicates that there is a sharp increase in sexual offences against children in recent times. This finding was corroborated by the study on Child Abuse: India 2007 by the Ministry of Women and Child, Government of India. Child marriage is seen as a mild form of violence against children. It also took into consideration the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter 'CEDAW') to which India is signatory. This Convention in Article 16.2 provides that "*The betrothal and marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specific minimum age for marriage and to make the registration of marriages in official registry compulsory.*"[17]

The Convention on the Rights of the Child (hereinafter 'CRC') by virtue of Article 34, provides that the Government of India is bound to "undertake all appropriate national, bilateral and multi-lateral measures to prevent the coercion of a child to engage in any unlawful sexual activity." The key words are "unlawful sexual activity" but the IPC declares that "a girl child having sexual intercourse with her husband is not unlawful sexual activity within the provisions of the IPC, regardless of any coercion."[18]

Further the Constitution of India under Article 15(3) provides that the "Legislature is empowered to enact any law for the benefit of women and children."[19]

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[14] *Id.*, s.10. "Punishment for solemnising a child marriage.—Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage."

[15] *Id.*, s. 11. "Punishment for promoting or permitting solemnisation of child marriages.—(1) Where a child contracts a child marriage, any person having charge of the child, whether as parent or guardian or 3 any other person or in any other capacity, lawful or unlawful, including any member of an organisation or association of persons who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, including attending or participating in a child marriage, shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine which may extend up to one lakh rupees: Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted a marriage, the person having charge of such minor child has negligently failed to prevent the marriage from being solemnised."

[16] *Id.*, s. 14. "Child marriages in contravention of injunction orders to be void.—Any child marriage solemnised in contravention of an injunction order issued under section 13, whether interim or final, shall be *void ab initio*."

[17] India became a signatory to the CEDAW Convention on 30th July, 1980 (ratified on 9th July, 1993) but with a reservation to the extent of making registration of marriage compulsory stating that it is not practical in a vast country like India with its variety of customs, religions and level of literacy. Nevertheless, the Supreme Court in the case of *Seema (Smt.)* v. *Ashwani Kumar* (2006) 2 SCC 578 directed the "States and Central Government to notify Rules making registration of marriages compulsory". However, the same has not been implemented in full.

[18] Art. 34 of CRC- "Sexual exploitation: Governments should protect children from all forms of sexual exploitation and abuse. This provision in the Convention is augmented by the Optional Protocol on the sale of children, child prostitution and child pornography."

[19] Art.15 (3) of the Constitution of India: "Nothing in this article shall prevent the State from making any special provision for women and children."

In light of above stated provisions the Parliament enacted POCSO. Its preamble provides that *'sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed'*. It directly contravenes Exception 2 appended to section 375 which does not criminalise sexual intercourse by husband with his wife between the age of 15 years and 18 years. IPC does not declare such sexual intercourse as penal offence. On the other hand, Section 5(n) of POCSO provides that if husband or any other member of family or friend commits 'penetrative sexual assault' with a child he shall be punished. Section 6 of POCSO provides minimum ten years of rigorous imprisonment which may extend for life and fine.[20]

The rape of a married girl child by her husband is termed as 'aggravated penetrative sexual assault' in the POCSO, but IPC does not recognize such sexual intercourse by husband with minor wife as rape. As per this scheme of law a person would be criminally liable under POCSO for having sexual intercourse with his wife but he would not be liable for any offence under IPC on the same facts. This dilemma was solved by section 42A of POCSO inserted by 2013 Amendment to Criminal Laws[21]which provides that the provision in POCSO are in addition to any existing law and in case of any inconsistency POCSO shall prevail. Moreover section 5 of IPC[22] read with section 41[23] provides that IPC does not affect the operation of any special law; POCSO being a special law shall prevail over IPC. Hence there is no inconsistency in POCSO and IPC.

On the analogy of the decision given by the Apex Court in the Independent Thought case marital rape of any women without looking at the age of such women shall be made an offence; as making a distinction on the basis of marital status or age of a women, whether the nonconsensual sexual intercourse would amount to rape or not is in violation of right to equality enshrined under Article 14 of the Constitution of India. Further it also violates the right to life and personal liberty of married woman if she is not allowed to refuse any sexual advances even from husband if she does not want to indulge in such act. It is ironical that a husband would be liable for outraging the modesty of his wife but if he has non- consensual sexual intercourse with her then he will not be liable for any offence.

Now time has come that we remove all the anomalies lying in our penal justice system to bring equality among both the sexes.

III. CONCLUSION

In the end we can say that though criminalizing marital rape as such was not the question which was dealt by the Supreme Court in Independent Thought case, but by declaring Exception 2 appended to section 375 in case of sexual intercourse by husband with his wife who is between the age of 15 years and 18 years unconstitutional the court has opened the gate to bring in the issue of marital rape within the ambit of penal laws. All what

[20] S. 6 of POCSO- "Punishment for aggravated penetrative sexual assault Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

[21] *Id.*, s. 42. "Act not in derogation of any other law-The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."

[22] Section 5 of IPC-"Certain laws not to be affected by this Act.—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law."

[23] *Id.*, s. 41. "Special law- A "special law" is a law applicable to a particular subject."

needs to be done is to pick up from point where the present case has left and get marital rape declared an offence.

INSTITUTIONALISATION OF ARBITRATION: A NEED OF ADR IN INDIA

*Akshay Verma**

The legal system of India is the typical Anglo-Saxon method of dispute settlement, wherein issues are settled between the parties, against each other in a versus mode. Inspired by the Colonial direction, this system is better known as the adversarial system of law wherein both parties fight it out in front of a neutral judge who sits as the adjudicator, ensuring that the rules are strictly followed, and the successful contestant is declared victorious. Though the belief behind such a system is that the truth shall emerge by the earnest contestations of such adverse opinions and contentions, yet, it is not a secret today that such adversarial system is plagued with lack of efficiency and want of expeditious settlement of disputes.

It is estimated that a total of 27 million cases are still pending in various courts of India. Of them, 61,344 cases are pending before the Supreme Court of India [1] (as of 30.04.2018); 38,91,076 cases are pending in the High Courts as reported in The Hindustan Times dated 15.11.2016; and a whopping 2,30,79,723 cases are pending before the lower courts[2]. No wonder then that Justice VV Rao of the High Court of Andhra Pradesh in 2010 said that the Indian Judiciary would need another 320 years to clear millions of these unresolved cases. Furthermore, India has been ranked 130 of 189 countries by the World Bank in its prestigious Ease of Doing Business 2018 ratings which clearly indicates the huge impact which the dispute resolution process has on its economy and its global image specially in terms of the ease of doing business by private companies in India[3].

The statistics stated above clearly indicate the need to usher reforms to expedite the dispute resolution process and devise strong mechanisms promoting out of court dispute settlements. Popular practices in India in this regard include, arbitration, negotiations, mediation and conciliation. In this present paper, the researcher focusses on arbitration, which is the first and internationally, the largest mode of resolving disputes.

Traditionally, arbitration has been regarded as an alternative to litigation for disputes regarding commercial matters. The disputing parties under this mechanism mutually choose a neutral third party or agency which renders a binding decision, thereby facilitating the resolution of disputes. Arbitration, like judicial proceedings too follows an adversarial design, wherein parties have no right to participate in the dispute resolution and the decision of the third party stands final. Yet, it is comparatively less formal in nature as compared to the traditional judicial mechanism. Arbitration is of generally two types namely ad-hoc or institutional.

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[1] "Summary: Types of Matters in Supreme Court of India", *available at:* http://supremecourtofindia.nic.in/p_stat/pm01042017.pdf (last visited on Sept. 5,2018)

[2] "Hindustan Times, Report: 27 million cases pending in Courts, 4500 benches empty", *available at*: http://www.hindustantimes.com/india-news/waiting-for-justice-27-million-cases-pending-in-courts-4500-benches-empty/story-H0EsAx4gW2EHPRtl1ddzIN.html (last visited on Sept. 5, 2018).

[3] "Hindustan Times, Report: 27 million cases pending in Courts, 4500 benches empty", *available at*: http://www.hindustantimes.com/india-news/waiting-for-justice-27-million-cases-pending-in-courts-4500-benches-empty/story-H0EsAx4gW2EHPRtl1ddzIN.html (last visited on Sept. 5, 2018).

Given the increasing use of arbitration world-wide, various new institutions of arbitration have emerged for resolving commercial disputes in both international and domestic realms. Institutional arbitration finds contractual mention in the form of arbitration clauses which determine the arbitral organization. The very fact that arbitration clauses have become a regular feature of standard contracts shows the popularity of arbitration as an alternative dispute resolution mechanism promoted by these institutions.

The Law Commission of India in its 246th Report,[4] chaired by Justice AP Shah constituted an expert committee to work on the "Amendment to the Arbitration and Conciliation Act (in short ACA), 1996,"thereby suggesting major changes to the ACA of 1996. The aim of the report was to find an appropriate balance between judicial intervention and judicial restraint and talked about various issues such as tackling delay in courts and arbitral tribunals along with enforcement of foreign awards, betterment in conduct of arbitral proceedings and encouraging the growth of arbitral institutions.

In its landmark decision in *F.C.I.* v. *Joginderpal Mohinderpal*[5], the Supreme Court at para. 7 observed that the law of arbitration should be simple and devoid of too many technicalities, yet it should be sensitive towards the reality of the situation. It should imbibe the ideals of fair play and justice and compel the obedience of the arbitrator to such norms and processes which shall boost the confidence by not only doing justice, but also by making the parties believe that justice appears to have been done.

However, a review of the rules of arbitral institutions reveal that weighty procedures from traditional litigation are still generally encouraged and prescribed by arbitrators who mostly include former judges who have an obvious familiarity with these procedures. This comes at the cost of efficient low-cost procedures, examples of which include, e-filing, e-discovery, hearings by teleconference/ video conference, etc.[6]Collaboration with leading international arbitral institutions can be an effective solution to this problem yet, it is the very absence of such collaborations which has prevented arbitration from gaining international recognition. It is sad to note that till date no such collaborations exist apart from those associated with Indian Council of Arbitration and The Nani Palkhivala Arbitration Centre.

Certain common grounds come to light when the reasons behind the success of leading arbitral institutions are examined. These include strong support from the government or the business community, location of these arbitration centers and other generic perks attached with arbitration procedure such as party-friendly rules, skilled panel of arbitrators, etc.

On September 17, 2017 at Karnawati University's United World School of Law, Justice Chamaleshwar echoed that ADR can never succeed until different and improved methods of implementation of ADR in legal services are not adopted. Moreover, it is no point to challenge the adjudication once again on similar rules on which regular appeals are treated.

India still needs to do a lot more to fulfill its ambitions in the field of Arbitration. One way to do this is to bring about a shift from ad-hoc arbitration to institutional arbitration. The ACA of 1996 was enacted for the very purpose of bringing quick and cost-effective

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[4] Government of India, Report No. 246 Published in August 2014, *available at:* http://lawcommissionofindia.nic.in/reports/Report246.pdf, (last visited on Aug. 25, 2018).

[5](1989) 2 SCC 347.

[6]See for instance, the Delhi International Arbitration Centre (DAC) (Arbitration Proceedings) Rules.

commercial dispute resolution mechanism in India. Even though arbitration enjoys primacy in resolution of commercial disputes in India, yet it is still evolving and has not yet reached the required stage to match the needs associated with commercial growth. Even though Indian courts do observe restraint in interfering with arbitral awards despite the power of judicial review,[7] however there are still certain inherent problems which hamper the working of successful arbitration in India. These include the need to amend the provisions of existing law to changing the mindset of the stakeholders involved such as parties, judges and lawyers.

The quality of Arbitration institutions varies greatly, having a direct impact on the efficiency and pace of the arbitration process, along with having an impact on the quality of the resulting award. Therefore, the formulation of a regulatory body at the national level shall involve the formulation of certain minimum standards for arbitration institutions in India. These may include, governance structure, rules of arbitration, data management, infrastructural requirements etc., for arbitral institutions in India.

The quality of the existing arbitral institutions can also be greatly improved by creating a specialist Arbitration Bar which would ensure that member lawyers are able to dedicate more time and resources singularly to arbitration alone. This would further promote its use as an alternative dispute resolution mechanism. Interaction with existing international arbitration institutions may open the doors for better understanding and adoption of the best methods of training to create a pool of lawyers especially dedicated to arbitration. Further measures would include strengthening of teaching of arbitration law in law school curriculums and involving professional institutions to impart training and education to lawyers.

The Arbitration and Conciliation Act, 1996 saw substantive changes under the 2015 Amendments with a view to expedite the arbitration process and make it more efficacious along with improving India's reputation as a seat of arbitration. However, more needs to be done in this regard such as:

(i) "Clarification of the ambiguities brought by the 2015 Amendments which have led to conflicting judicial interpretations, for instance- the prospective applicability of the 2015 Amendments;
(ii) addressing the concerns thrown up by the 2015 Amendments, particularly relating to the provision of imposing strict timelines for the conduct of arbitration proceedings;[8] and
(iii) bringing Indian legislation in line with international practices, including legal provisions concerning the following:
    1. Funding by third party
    2. Immunity to arbitrators
    3. Confidentiality of arbitration proceedings and related court proceedings
    4. Indian parties having a foreign seat of arbitration
    5. Indemnity costs for court proceedings intended to frustrate arbitration proceedings
    6. Tightening grounds for challenge to enforcement of foreign arbitral awards."[9]

[7] *McDermott International Inc*. v. *Burn Standard Co. Ltd*, 2006 11 SCC 181.
[8] S. 29A, Arbitration and Conciliation Act (Amendments), 2015.
[9] Legalaffairs.gov.in

The cabinet has recently approved the Arbitration and Conciliation (Amendment) Bill, 2018 which aims to make several changes to laws of arbitration. The amendments are inspired by the report formulated by the Justice B.N. Srikrishna led Committee which recommended the formations of council to set benchmarks and grade arbitral institutions of India. However, several important recommendations for development of arbitration process in India have been dropped such as those regarding appointment of eminent oversees practitioner nominated by Attorney General of India, on the governing body of the council to facilitate the adoption of internationally sound practices. Moreover, contrary to the recommendations of the committee, the governing body of the Arbitration Council of India would only include those who are nominated by the government and members of ministries.

The above-mentioned Arbitration and Conciliation (Amendment) Bill 2018, further introduces the concept of an autonomous body called Arbitration Council of India (hereinafter referred to as ACI). The main aim of this body is to frame policies to grade institutions; accrediting arbitrators; look after the establishment, operation and maintenance of uniform professional standards; maintaining depository of arbitral awards made in India and abroad. The bill further provides that on accounting of failure by parties to choose an arbitrator, the Supreme court would direct the parties to Institutional Arbitrations who shall chose the arbitrator(s). Furthermore, in case of International Commercial Arbitration, Institution will be designated by Supreme Court. For the Domestic Institutional Arbitration, the High Court would designate the Institution. If there is no designated Institutional Arbitration, then Chief Justice of High Court will provide for the panel of Arbitrators to perform functions of an Arbitral Tribunal. The proposed ACI shall include as its members, a chairperson, who can be a judge of the Supreme Court or High Court or Chief Justice of High Court or an eminent person; and other members who can include eminent arbitrator practitioners, academicians with expert knowledge or government appointees.

The presence of judges or government appointees in the panel as mentioned above starkly reveal not only judicial interference but also interference by the executive which might again hamper the credibility of the arbitration proceedings.

The examples of Singapore and Hong Kong prove how legislative and governmental support play a crucial role in flourishing of the arbitral institutions. The case of Singapore clearly demonstrates the way in which legislative interventions have ensured Singapore's phenomenal rise as the seat for arbitration, leading to growth in the SIAC caseload. In the Indian context this example could indicate that instead placing excessive reliance on the courts to remove via case-laws, the ambiguities in the legislation, the legislature can be pro-active to ensure that ACA stays up-to-date with developments in international arbitration law and practice. The government can also give incentives for developing physical infrastructure to promote the growth of institutional arbitration. Moreover, the government may further boost the use of institutional arbitration by ensuring that all commercial contracts being entered by the government provide for institutional arbitration in an Indian institution, above a certain value.

The creation of an international arbitration culture requires efforts from the government to disseminate information regarding benefits of alternative dispute resolution mechanism which would generate respect for arbitration amongst the lawyers, judges and national courts. A major impediment in enforcing foreign awards around the globe, despite favorable provisions in the New York Convention and Geneva Convention, is thus not of a legal nature but is due to the lack of awareness regarding the benefits of arbitration and of its true consensual nature amongst the lawyers and judges who are amongst its major stakeholders. The confidentiality requirements of ADR too pose their own sets of problems.

The 2015 Amendment though provides for confidentiality of proceedings yet in certain situations they do allow for the publication of the arbitral award which may be disliked by the parties involved.

The reputation and prestige attached to institutional arbitration is one of its biggest strengths. Arbitral awards by well-known institutions such as the ICC is widely perceived to have favorable chances of enforcement. This is so because, the courts so tasked with enforcement of these awards tend to be more accommodating, keeping in mind the reputation of the institution for running a well administered and supervised arbitration.

The rules of Institutional Arbitration are set out in a booklet which is incorporated by the disputing parties into their arbitration agreement when they agree to submit a dispute to arbitration as per the rules of named institutions. One of the principle advantages of the institutional arbitration is this automatic incorporation of the book of rules, which is generally mentioned in the institutional arbitration clause in the agreement between the parties. For instance, the bare-bones clause recommended by KCLRA, states that arbitration would be used to resolve any dispute, controversy or claim with respect to the contract or its breach, invalidity or termination thereof, in accordance with the Rules for Arbitration of the Regional Centre for Arbitration Kuala Lumpur. Clauses like these provide for the minimal yet essential elements required in all most all jurisdictions, for an enforceable arbitration clause and is further useful for those parties who are unable to get specialist advice. Moreover, another major advantage of such clause which states the rules and regulations regarding the appointment, conduct and administration of the arbitral tribunal and award, is that it would make arbitrating effective even in those cases when a party tries to drag its feet in the proceedings. These rules further provide for various factual situations which are possible to arise in arbitration and the contesting parties thus have the advantage of having with them, a set of tried and tested rules of arbitration.

The provision of trained staff further adds to the merits of institutional arbitration. This staff is generally tasked with ensuring the smoothness of the arbitral process and takes care of various aspects such as, appointment of the arbitration tribunal, advancement of payments with respect to expenses of arbitrator, keep track of time constraints, etc. If such staff is not present then the task of looking after these aspects falls on arbitral tribunal itself, which might create difficulties in administration of arbitral proceedings specially in case of international arbitration when sometimes the arbitrator is not a resident of the country of arbitration. Moreover, handing such administration work will run the risk of distracting the tribunal from its primary task of resolving disputes between parties.

Apart from administration, arbitration institutions like International chamber of Commerce (ICC) and International Court of Arbitration located in Paris (ICC Court), carefully scrutinize an award before its publication. This is done to ensure that the reasoning and content of the award takes notice of all claims and counterclaims made by parties. Moreover, they also check the adherence of the procedure to principles of due process. Furthermore, The ICC Court reviews the award on only procedural grounds and is not mandated to review the award on merits. This is done to ensure that there is non- interference with the tribunal's exclusive power in deciding the dispute in final instance. No such quality control measures exist in ad-hoc arbitration.

Speed is of the essence in all arbitrations, irrespective of them being institutional or ad-hoc in nature. Tight time periods are set in the arbitration procedure for the exchange of pleadings of the parties, the main hearing and the publication of the final award. These time limits generally aim to guide the tribunal and the parties to ensure the swift resolution of

disputes even though parties do get some freedom to adopt a more flexible time table and missing a deadline is not fatal.

Another important advantage of institutional arbitration is regarding the remuneration process. Most arbitral institutions have adopted mechanisms which determine the scale of remuneration and the money collected from the parties is paid to the tribunal without involving the arbitrators. This ensures material detachment of the arbitral tribunals up to some extent and further avoids discomfort to the parties and the tribunals in dealing with aspects relating to discussing and fixing the remuneration charges. This allows the tribunal to focus only on the substance of the case and not discuss matters personal to the parties.

Certain rules of institutional arbitration further provide for continuation of the proceedings ensuring that they do not stop short even where one party defaults during the arbitral procedure. For instance, article 21(2) of the ICC Rules gives the power to the tribunal to proceed with the hearing even if any of the party when summoned, fails to appear without providing valid excuse for the absence.

Further strengthening of institutional arbitration in India would require a change in the way arbitration is viewed in the country. Steps must be necessarily taken to transform existing mindsets favorably towards ADR mechanisms, including mediation. Measures to promote the popular use of these mechanisms in institutional mode must be considered.

Sincere efforts should be made by all stakeholders including arbitrators, judges, lawyers to bring about an attitudinal change towards arbitration. This necessarily involves the players in the proceedings to grasp the direction of the law in tandem with the will of the parties as set out in the arbitration clauses, and critically observe the dichotomy between litigation and arbitration. The need of the hour is to change the mindset with the aim of making the system more effective, attractive and functional.[10]

[10] Inaugural address by Justice Santosh N Hedge, Judge, Supreme Court of India, on Indian Council of Arbitration's National Conference on 'Arbitrating Commercial and Construction Contracts' held at Hotel Inter-Continental, New Delhi, December 6, 2003.

NOTES, COMMENTS AND OPINIONS

GLOBALIZED ECONOMIC WORLD: STRUCTURAL REFORMS OF INDIAN LEGAL PROFESSION AND EDUCATION

TSN Sastry[*]

The current phase of globalisation calls for sustainable economic standing of a nation to tinsel in the comity of nations. To build such a robust system, mere economic reforms without legal reforms cannot yield the desired results. India, as a major developing economy, urgently needs to undertake reforms in legal education and profession which interlinks with each other.

In spite of tinkering efforts of legal education by Bar Council of India (BCI), a number of inadequacies still hamper the quality of legal education which in turn has its own impact on the profession. To match with the global standards, curriculum, teaching, research patterns, profession and legal system need a refurbish with a multivalent thought. This calls for inquisitive diversity in legal curricula, profession, which in turn will strengthen justice delivery system with more accountability to society at large and could develop sustainable supporting systems to diversify economic aspirations of state and people to realise the objectives of right to development as a part of legal fabric.

To address the pitfalls of legal education, it needs to be free from BCI. A National Legal Academic and Research Authority with academicians, researchers, lawyers and judges with different wings needs to be established to regulate legal education and research, profession and to support legislature to strengthen legal system and judiciary to match with contemporary realities. The primary wing needs to redraft legal curriculum by involving professors across disciplines with multidisciplinary approach to focus on theoretical proposition with practical applicability than merely inculcating memorisation of codes and sections. At the same time, comparative perceptions of law, practical and theoretical disposition between legal systems, inter play between contemporary realities, public law, public policy; conflict of laws, techniques of court management with practical orientation coupled with research skills has to be imparted. A second wing needs to coordinate with BCI and judicial authorities to impart judicial discourse education and training at regular intervals. A third wing has to look after policy formulations with research orientation to assist the Legislature to draft laws in a simple and understandable perspective and to review the existing laws to weed out inadequacies and also assist the Executive in its legal business. Above all, an administrative liaison wing is necessary for smooth functioning of the body with an inclusive outlook to address any legal crisis.

In addition to the aforesaid, a restructure of judicial system is required. In short, the Supreme Court of India has to be the prime court to address only constitutional and nationally important matters. Two independent Supreme Courts of civil and criminal judicature should be established outside the national capital for clearing backlog and quick access to justice. A

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similar pattern has to be followed at the state level from High Courts to lower courts.[1] A Judicial Impact Assessment wing has to be established under the jurisdiction of Supreme Court of India to oversee the free flow of finances to judiciary to address its concerns as directed by the Supreme Court of India.[2]

Young lawyers and judges until they gain 10 years of experience from entry level should be trained continuously with yearly intervals for about a months' period through judicial discourse regarding the methods and means of adjudication, ICT based disposition of cases, and interactive live sessions with their foreign counter-parts. One biggest change that is required is that the pleadings in open court should be reduced to minimum time frame and written submission of the cases should be insisted for speedy disposal of cases, like many of the developed countries' judicial system. In a similar fashion, law teachers too need regular updating of procedural and research techniques of the profession. To reduce the burden of judiciary, and to gain practical experience, law teachers may be permitted to dispose of petty cases and revenue, motor vehicles cases etc, should be removed from the administrative jurisdiction at the district level. This would buttress theoretical knowledge with practical orientation to make the lectures lively and administrative wings could discharge their obligations with more efficiency.

The mushroom growth of law schools across the country is to be rationalised from the present more than 1200 to 500. The Departments at University level should be left with only post graduate teaching and research programmes to concentrate seriously on research. The senior lawyers, judges, especially judges of higher courts, need to interact with academics and senior retired judges should be invited to join as emeritus professors in the University post graduate departments to undertake research to assist the profession for all round development and live up to the expectations of preambular objectives of justice, liberty, equality and fraternity in true perspective and to assist the proposed National Legal Academic and Research Authority with their practical and pioneering research activities.

The above few suggestions call for soul searching introspection by the government, all wings of judicial and legal fraternity, without any inkling of one-upmanship towards each other. If the changes suggested by the author are taken with all seriousness, definitely India can not only redress many of its pitfalls in various fronts, but certainly turn its status as a developed economy in a quick span of time and could provide access to justice to millions of its far left behind citizenry. That would be a real tribute by India to discharge its commitments to the present phase of economic globalization. This could also attract foreign investors, as the legal system will protect them effectively and they will not depend on the behest of political parties or governments in power.

[1] For a detailed discussion see, TSN Sastry, "Access to Justice and Judicial Pendency: Confluence of Juristic Crisis" 4 *M. K. Nambyar SAARC Law Journal* 83-118 (2016).

[2] TSN Sastry, "Judicial Impact Assessment as a Tool to Strengthen Access to Justice and Democracy in India: Lessons to Learn from the Experience of USA", 6(1) *KIIT Journal of Law and Society* 34-39 (2016)

NOTA (NONE OF THE ABOVE): NEED TO RE-VISIT

*Arvind P. Bhanu**

I. INTRODUCTION

In recent Gujarat Assembly elections, more than 5.5 lakh voters used NOTA. It remained fourth most popular choice of the voters with 1.8% of total votes cast in the Assembly polls in 2017[1]. After NOTA came in existence in 2013[2], the State of Bihar went for poll and the same depicted on the top of the NOTA list with 2.48% votes in 2015. In this election Gujarat registered itself with second highest in the same list. Its efficacy is still symbolic or struggling to come out of the cage to its alterable force. This evaluation process of NOTA instrument has been in debate since its birth because in our system it is a negative vote. The candidate wins if she/he gets largest votes in the election based upon the first-past-the-post system. However, one question is still unanswered if NOTA can be a part of the above system where a few hundred votes could be the difference between victory and defeat. Meaning thereby the NOTA with present status will not affect electoral results because it is not right to reject.

The NOTA was introduced with a view to give a means to those who want to reject a candidate/s. This rejection is found in two ways- either not to go to cast vote passively or cast vote in favour of NOTA rejecting the candidate actively. The reasons are apparent in democratic manifestations like criminalization of the representative system and impersonation in polling booth etc. An instance of 15th *LokSabha*is on the point to indicate that 80% of the *Shiv Sena*, 41.07% of BJP and 23.88% of Congress were found facing criminal Charges[3].It is a settled rule that the charge is not conviction. The tainted political leaders cannot be stopped from contesting election on the ground of charge of crime/s. Final conclusion of charge is very sure in inordinate delay. NOTA was thought of as one of the measures for diminishing decriminalization mark in representative system of governance and to curb the impersonations in elections[4]which could result in free and fair elections. The election commission also took other initiatives in civic polls which were held in Madhya Pradesh in 2017 by putting up flex hoarding on polling booths depicting the criminal records of the candidates. MP was the second Sate after Maharashtra to take this initiative to discourage criminal elements from entering in politics.[5]

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[1]*Available* at: http://ecisresults.nic.in (last visited on Jan. 6, 2018).

[2]*People's Union for Civil Liberties* v. *Union of India* (2013) 10 SCC 1.

[3]Namita Bhandare, "NOTA just a symbolic act" *The Hindu*, March 15, 2014.

[4]*Supra* n. 2.

[5]"MP to display candidates' crime record at Polling Stations" *Times of India*, August 06, 2017.

II. PLACING WITH VOTING RIGHTS

Our Constitution begins with words that India is 'democratic republic'. Democracy which is a Greek word signifies a State in which leaders are chosen from general public. Contextualizing preamble of the Constitution, it refers that India has a responsible and parliamentary form of government which is accountable to an elected legislature[6]. The Supreme Court has recognized democracy as the basic feature of Indian Constitution[7]. In context with term republic, it denotes that the head of the State is not a hereditary but an elected functionary. Further, going by specification of democracy, it is the political democracy which envisages: (i) representation of people, (ii) responsible government, (iii) accountability of the Council of Ministers to legislature. The essence of political democracy is to draw a direct authority from the people through the legislature to the executive[8]. This can only be fulfilled through the free and fair elections, meaning thereby, allowing citizens to participate in electoral process.

To give effect to the declaration 'democratic republic', Article 325 of the Constitution mandates for one general electoral roll for every territorial constituency for *election to either house of parliament or to the house of State legislature....* The provision ensures the political equality to all citizens of India. The Supreme Court in *R. C. Pounyal* v. *Union of India*[9] made it clear that the provision contained in this article, if contravened, will have adverse impact upon the secular character of the Republic which is the basic feature of Indian constitution. Article 326[10] of the Constitution lays down *adult suffrage* as basis for election. This gives the most important provision for ensuring political democracy. Here, the right to vote originates.

Our Constitution came into effect on 26th January 1950. The first elections were held after the passage of Representation of People Act in 1951. The statute like this one was needed to provide mechanism, conduct of elections, criteria for voters and candidates etc. If we go by its section 62, we find the following six clauses in relation to right to vote. "(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950.(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.(4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to

[6]See M. P. Jain, *Indian Constitutional Law* 11-12 *(*Lexis Nexis, Wadhwa, Nagpur, 2007)
[7]*S. R. Bommai* v. *Union of India* (1994) 3 SCC 1.
[8]*S. R. Chaudhari* v. *State of Punjab* (2001) 7 SCC 126, 138-39 (Para 21)
[9]AIR 1993 SC 1804.
[10] The election to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say every person who is citizen of India and who is not less than eighteen (see 61st Constitution Amendment, 1988) years of age on such date as may be fixed in that behalf by or under any law made by appropriate Legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as voter at any such election.

preventive detention under any law for the time being in force. (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector."

The treatment given in both the places in Constitutional law and the statute passed by the Parliament shows that one place originates the right to vote whereas the other actualizes the same, though both the laws direct towards the same destination but with different identity. In number of cases[11], the Court has made it clear by giving reference as to who can cast vote and limitations provided in statutory provisions that right to vote is *not civil right but is a creature of statute or special law*. However, Prof. M. P. Jain differs on the point by giving due regard to Articles 325 and 326 of Indian Constitution. He says that "the right to vote is neither common law right nor fundamental right. But it is also not purely a statutory right but much more substantive than that. The right to vote is not a gift of the Legislature but flows from the Constitution. In first place, free and fair election has been declared to be a basic feature of the Constitution which means that no statute can completely negate the right to vote"[12]. Adding to the above view it can be also submitted that any contravention by legislature of Article 326 (as mentioned above) will disturb the secular feature of the Constitution. And consequently, the impugned statute may be struck down on the ground of violation of basic feature of Indian constitution. Furthermore, if right to vote is denied on the ground of equal treatment, the remedy provided under Articles 32 and 226 may be invoked. Thus, as per the above discussion, right to vote, though not fundamental and common law right but at the same time is not a purely statutory right.

Existence of voting right and exercise of voting right is different from each other though they belong to the same family and directing towards same object. As said above, the former originates from Constitution but placed in statue on the basis of actualization. But since the exercise of the former is an expression of one's choice, it is protected under Article 19 (1) (a) of Indian Constitution. The exercise of voting right is fundamental right.

On journey of right to vote, it originates from Articles 325 and 326 of Constitution and places in the Statute and during exercise it becomes fundamental right. An act of voting or voting rights comprises right to know about the antecedent of the candidate. "…right to know the background of a candidate is a fundamental right of a voter so that he can take a rational decision of expressing himself while exercising the statutory right to vote"[13]. Thus, expressing his voting wishes in favour of one and other is an expression under fundamental right concept. However, in case the voter does not go to the polling booth or he goes to polling booth but does not cast his vote he waives off his statutory right.

It is argued that the right to vote is not a fundamental right but a statutory right, so Article 32 of Constitution could not be invoked by the petitioner. Sections 171A(b)[14] and 79D[15] of Indian Penal code and Representation of people Act 1951 respectively give the meaning of the expression –'electoral right' of the voter as a right to choice to vote or refrain

[11] See *N P. Pannuswami* v. *Returning officer, Namakkal Constituency*, AIR 1952 SC 64; *Jamuna Prasad Mukharia* v. *Lachhi Ram*, AIR 1954 SC 686; *P. Nalla Thampy*v. *B. L. Shanker*, AIR 1984 SC 135, etc.
[12] *Supra* n. 6 at 805.
[13] *Supra* n. 2 at 78D.
[14] 'Electoral right' means the right of a person to stand, or not to stand as, or to withdraw from being a candidate or to vote or refrain from voting at an election.
[15] 'Electoral right' means the right of a person to stand or not to stand as, or to withdraw or not to withdraw from being, a candidate, or to vote or refrain from voting at an election.

from voting. By adding new dimension to the right based approach, the NOTA judgment made it a fundamental right protected under freedom of expression[16] of Indian constitution. This dimension strengthens a major element (people's participation in election and decision-making process) of democracy which distinguishes it from authoritarianism.

III. INTERFACE WITH NOTA

Going through the Rule 49 (O)[17] of R. P. Act which was giving an option to reject the candidate with a requirement of conveying his choice to the polling officer and NOTA option raised secrecy issues and unrepresented citizen/s in representative form of the government system. On the secrecy concern, the Supreme Court took a view in *Kuldip Nayar* v. *Union of India*[18], and said that the voters for council of States membership are required to show their vote to the party representative. Hence, the secrecy in choice of vote has already been compromised. '*Democracy about the choice'*[19] was one of the foundations to raise the reasoning towards NOTA journey. Further, NOTA application in Rajya Sabha election in Gujarat and implication on Tenth schedule, the Court made it clear that even in case of presence of whip for Rajya Sabha candidate, the anti-defection law of tenth schedule will not disqualify a defiant MLA[20]. Thus, the NOTA option is strengthening '*Democracy about the choice'* premise but it requires more addition to it. Question should be raised and determined politically on the floor of the house if a large percentage of voters go in favour of NOTA. The Legislature should give space for right to reject[21] to the voter. The election commission should fix a limit beyond which the percentage of NOTA will invite re-election. As already stated, with an irony tone to link NOTA with FPTP (first-past-the-post) system, the Law Commission itself has recognized this system's failure to realize fundamental test of fairness. In these circumstances, the recommendations of 170th Report of Law commission of India[22] should be implemented.

[16]Art. 19(1)(a) of Constitution of India states that all citizens shall have the right to freedom of speech and expression.
[17]Secrecy of the ballot is violated as the voter has to inform the presiding officer and an entry is made against his name in the voters list. (… a remark to this effect shall be made against the said entry in Form 17A by the presiding officer).
[18]*Kuldip Nayar* v. *Union of India*, AIR 2006 SC 3127
[19]*Supra* n. 2.
[20]Editorial, "The NOTA Principle: On Rajya Sabha Polls" *The Hindu*, August 04, 2017.
[21]Subhash Kashyap, "NOTA will not serve the democracy" *Frontline*, November 01, 2013.
[22]*Available* at: http://www.lawcommissionofindia.nic.in/lc170.htm ((last visited on Jan. 6, 2018).

INTERFACE BETWEEN COPYRIGHT AND HUMAN RIGHTS

*Archa Vashishtha**

I. INTRODUCTION

The hefty expansion of subject matters of IPRs led academicians likes James Boyle to define it as "second enclosure movement". This time having subjects not lands but the result of the human intellect like copyright, patents etc. Different links have evolved over the time between various kinds of Intellectual Property and Human Rights. The roles of private property in human rights have always been controversial and this is so in the case of Intellectual property law and Human Rights interface as well.

If we talk specifically about Copyright, copyright and Human Rights are two subjects that developed in absolute isolation of each other but from past few decades their intersections became common owing to development of various national and international instruments dealing with both human rights and copyright. The two are trying hard to reconcile and deal with the conflicting issues. As far as human rights are concerned every individual has his/her own conception of human rights. Simply put human rights are something that exists by virtue of humanity and nothing else. We don't possess human rights because they are written somewhere but because they are the foundation of any independent society. Though, it is a different matter altogether that human rights have gained formal legal recognition and can be effectively enforced under various national and international instruments. Human rights approaches bring back values to the system. Human rights protect not only civil and political rights but also social, economic and cultural rights of the people.

Copyright on the other hand is a property right that is provided to the authors of certain categories of creative work. Threads that weave Intellectual Property and Human rights seem to have their roots in the natural law, most famously as the Lockean moral desert theory, which held that property rights should be commensurate with the sacrifice incurred. So, it can be said that property right is a reward for work done to create new works.[1]Moreover, copyright is a right in a property which in turn could be seen as human rights. Also, it is the economic right of the author to reap the economic benefits of his hard work and author's moral right to maintain the integrity in their work. Copyright also relates to freedom of expression of the authors and also their right to practice and profess any occupation. As regards to the larger public interest there is a general belief that copyright protection violates certain important human rights like right to access to information, cultural rights, right to education etc. Where copyright protects the rights of an individual human being i.e. the author of the work and human rights is meant for all human beings, the latter is to be given priority over the former.

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[1]Daniel J. Gervais, "How Intellectual Property Rights and Human Rights: Can Live Together: An updated Perspective" inPaul L.C Torremans, *Intellectual Property Law and Human Rights* 3-26 (Wolters Kluwer, 2008).

It can thus be said that the debate extends both ways i.e. the need for proper protection of human rights of authors by way of copyright and protection of human rights of the larger mass which is threatened by copyright protection. A balancing exercise thus becomes extremely important keeping in mind the tremendous growth in the number of international instruments dealing with intellectual property making it obligatory for all the countries of the world to protect copyright. Moreover, copyright protection which traditionally extended only to original literary, artistic and dramatic works has enormously elaborated its subject matter. Today copyright is used to protect software, rights of the authors of underlying works, yoga postures, tattoos and what not. In these circumstances it becomes extremely important to look at this interface closely and solve the conflicts between these two independent and important rights.

II. INTERNATIONAL INSTRUMENTS

There are various international instruments that recognize both human rights and copyrights together and even refer intellectual property though not in proper sense of the word as human rights.Article 27 of the Universal Declaration of Human Rights, 1948 states:

> "(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
> (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

Article 27 as a human right is of universal nature and vests on every human being. Furthermore, the human rights that are embodied in UDHR are to exist independently of such right's recognition in legal system or customs or enforcement in their own country. Article 27 gives rise to paradoxical juxtaposition of public right to access to scientific and private right to protection of scientific, literary and artistic works to which he is the author. In itself this provision highlights the clear conflict that exists between these two rights.[2]

It is not the only provision that is raising such a concurrence. Article 15 of the UN Covenant of Economic, Social and Cultural Rights also talks about the same and states:

> "The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

The Original clause 1 of Article 15 of the draft covenant did not include clause (c). It can thus be said that it is originally viewed only from the point of view of end users of the scientific works and the rights of the authors of these works was recognized later. This clause was basically included to provide piracy of literary and scientific works by other nations who are not going to pay any royalties to the authors of these works. It can be said that this provision focuses on the general interest to participate and get benefit from the new inventions at the same time providing protection to the authors and creators of these work. This provision like Article 27 envisages that the two rights should go hand in hand leaving

[2]Vandana Mahalwar, "Copyright and Human Rights: The Quest for fair Balance" in Manoj Kumar Sinha & Vandana Mahalwar, *Copyright Law in the Digital World* 151-174 (Springer, 2017).

behind a number of questions as to how a balance between enjoyment of the fruits of science and incentives of innovation can be achieved.[3]

III. CONFLICTS IN VARIOUS HUMAN RIGHTS

Whenever we think of Intellectual Property Rights we think of entrepreneurship and innovation while it is much more than that. Intellectual property and Human Rights are the new frontier that needs to be looked at. Though copyright protection is essential to protect the human rights of the authors of the protected works, at the same time it is also essential to find whether it violates any other human rights. There are certain human rights which are generally considered to be violated by the copyright protection some of which are:

1. Freedom to Create: When copyright gives the author of original, literary or artistic work to protect his/her work from infringement or copying it takes away other right from borrowing that work. There are situations where copyright protection is pitted against the public need for information and is required to be shared at an urgent basis for larger public good. Though the rules relating to idea expression dichotomy may provide certain answers to this situation. On the other hand, there are also rules relating to parody, fair use etc. which can provide enormous scope to the artist to create his/her new work by borrowing something from the work of the original author. Yet the issue is required to be looked into in detail to find out how far these two rights are in conflict.

2. Freedom of Speech and Expression: Article 19 of the UDHR provides freedom of speech and expression to every human being. Freedom of speech and expression refers to the right to express oneself freely. Relationship between copyright and freedom of expression has long been debated. As per few they cannot reconcile while many believe that they two are absolutely different fields and have no relationship at all. Though arriving at a conclusion is absolutely necessary as both these rights are immensely important for the development of a society. *Ashby Donald and Others* v. *France*,[4] is the first case that came in front of ECHR dealing with freedom of speech and expression and copyright law of France. Though the case was not made out but the court clarified that illegal reproduction of public communication protected by copyright shall be considered an interference with freedom of expression.[5]In India Article 19 of the Constitution provides for freedom of speech and expression and also put certain restrictions on the same. It is important to mention here that copyright is not one of the restrictions that have been put on the fundamental freedom of speech and expression. What is protected under the copyright law is the expression of an idea and not the expression itself, until and unless one does not want to copy from others work copyright does not in any way seems to violate the fundamental freedom of speech and expression guaranteed under the Constitution of India.

3. Right to Education: The importance of education can never be undermined. It is the basic stone on which the development of any society rests. The significance of education can be realized from the fact that it has been recognized as a human right in

[3]*Available* at: http://assets.wwfindia.org/downloads/human_rights__ipr_in_trips_era_3.pdf (last visited on Nov. 20, 2018).
[4]Appl. Nr. 36769/08.
[5]Krisjan Buss, "Copyright and Free Speech: The Human Rights Perspective", 8(2) *Baltic Journal of Law and Politics* (2015).

most of the international instruments. Right to free and compulsory education has been identified as both fundamental right as well as directive principle under the Constitution of India. The development of Information and Communication technology has provided people with the riches of information that has the power to decrease the educational gap. The conflict between copyright and right to education occurs in numerous ways but one that has been debated throughout the world is who owns the educational material in which authors have a material interest and it is also one of the basic sources of the education. The recent *Rameshwari*[6] photocopy case raised the eyes of the entire country on this issue, though the decision was in the favour of the students. Copyright is one reason for the high costs and less availability of educational material. Though there are number of exceptions and limitations in the Indian Copyright Act to deal with this issue yet it is a hurdle in providing educational material to the public at large. Moreover, with the laws relating to digital protection of copyright becoming stricter, another question that arises is that how internet can distinguish between the normal user and one who falls under any exception specified under the Copyright Act.

4. Right to Access to Information: Right to information is today recognized as a fundamental right and it has time and again been reiterated by the courts that right to information is one of the prerequisites of a democracy. In *R.P Limited* v. *Indian Express Newspaper*[7]Supreme Court read right to know under Article 21 and held it to be an important prerequisite of participatory democracy. Right to Information or access can come directly in conflict with the copyright as the economic and moral rights of the author can be violated if his work is openly accessible at the same time too many restrictions on the availability of protected work can hamper the growth of the society. There are many provisions in the Indian Copyright Act that take care of this dispute and try to reconcile the conflicting claims of different group like those relating to fair use, compulsory license, idea-expression etc. Strenuous legal protection can no doubt hamper the right to access to information but if the exceptions and limitations are properly applied the two can go hand in hand.[8]

5. Cultural Rights: Cultural right can be defined as the right of access to, participation in and enjoyment of culture. The impact of copyright on cultural rights has long been neglected. In spite of flexibilities offered by IP regulations the conflict between cultural rights and Intellectual Property particularly copyright is becoming common. This can be seen by compression of exceptions and limitations provided under the various copyright laws. These exceptions and limitations are the main sources by which cultural rights can be enjoyed by the public at large. Another example could be with reference to protected work over internet, internet like a human being is unable to distinguish or apply exceptions in case of innocent usage.[9]

IV. CONCLUSION

[6]CS/OS 2439/2012.
[7] AIR 1989 SC 190.
[8]*Available* at: http://shodhganga.inflibnet.ac.in/bitstream/10603/33710/5/chapter5.pdf (last visited on Nov. 20, 2018).
[9] Caterina Sganga, "Right to Culture and Copyright: Participation and Access", in C. Gieger (ed.) *Research Handbook on Human Rights and Intellectual Property* 560-576 (Edward Elgar, 2015), *available at:* https://papers.ssrn.com/sol13/papers.cfm?abstract_id=2602690 (last visited on Dec. 12, 2018).

It is itself clear from the provisions of UDHR and ICSECR that copyright and human rights are in conflict with each other. The important question is how and where all the two intersect and how they should be balanced. There is no doubt in the fact that both copyright and human rights are important for the growth of any society. We cannot ignore one for other, what is important is to find the solution so that the two can walk happily together

CYBER TECHNOLOGY

*Nishesh Sharma**

Wilhelm Sch Caickard designed the first mechanical calculator in 1623, but did not complete its construction.[1] Blaise Pascal designed and constructed the first working mechanical calculator, the Pascaline in 1642.Charles Babbage first designed a difference engine and lateran Analytical Engine for general purpose during Victorian times,[2]the manual of which was written by Ada Lovelace. Because of this work Ada Lovelace is regarded today as the world's first programmer.[3]

The punched card machines were first introduced around 1900. During the 1940s, as newer and more powerful computing machines were developed, the term computer came to refer to the machines rather than their human predecessors.[4] Computer science began to be established as a distinct academic discipline in the 1950s and early 1960s.[5] A more comprehensive study of the history of development of computer and its use could be had from the work of the learned Dr. M. Dasgupta, in his much acclaimed book Cyber Crime in India. Today computers are used in almost all the research studies including forensic studies. The United States government recognized the interconnected information and computer technology in the forensic field and also the interdependent computer network of the information technology infrastructures which operated on this virtual medium-the cyberspace as part of the US national critical infrastructure. People who use cyberspace, are believed to share a code of ethics and rules amongst themselves which are useful for everyone to follow, and are referred to as cyber ethics, and the forensic field is not an exception to it. In other words cyber ethics plays an important role in the forensic field. For instance the right to privacy is considered to be most essential to the functional code of cyber ethics. It is believed that moral responsibilities are essential when working online in cyberspace, particularly, when views are on the online social experiences. However, the word cyberspace has been criticized by William Gibson who described it as an "evocative and essentially meaningless" buzzword that could serve as a cipher for all of his "cybernetic musings". This in a sense gives an impression that cyber forensics itself is a buzzword that could itself serve as a cipher for all the electronic or digital evidences.

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[1] Nigel Tout, "Calculator Timeline", Vintage Calculator Web Museum. (2006), *available at*: http://europeandataservices.com (last visited on Nov. 14, 2018).

[2] "Science Museum - Introduction to Babbage", *available at*: http://www.sciencemuseum.org.uk/ objects/ computing and_ data processing/1878-3.aspx. (last visited on Nov. 14, 2018).

[3] A Selection and Adaptation from Ada's Notes found in Betty Alexandra (ed.), *Ada, The Enchantress of Numbers* (Strawberry Press, Mill Valley, 1992).

[4] The Association for Computing Machinery (ACM) was founded in 1947, *available at*: http://history.acm.org/ (last visited on Nov. 14, 2018).

[5] Denning, P.J., "Computer Science: The Discipline"(PDF).Encyclopedia of Computer Science. (2000), *available at:* http://web.archive.org/web/20060525195404/http:/www.idi.ntnu.no/emner/dif8916/ denning.pdf. (last visited on Nov. 14, 2018). Also see, "Some EDSAC statistics", *available at:* https://www.cl.cam.ac.uk/events/EDSAC99/statistics.html (last visited on Sept. 5, 2018).

I. CYBERSPACE AS THE SYNONYM OF INTERNET

Cyberspace and Internet are not the same and should not be confused as such. Cyberspace is usually used to mention the identities and objects which largely exist within the realm of communication network. Thus a Website, for instance could metaphorically be said to "exist in cyberspace." So, therefore the events which take place on Internet do not take place in the locations where the servers or users or participants are located physically, but such events take place "in cyberspace". Cyberspace explains the flow of digital data. In cyberspace this data goes through a network of computers connected with each other. Cyberspace is not the "real world", as we cannot locate it spatially as a tangible object doing "real" functions. Also, cyberspace is where the computer-mediated communication (CMC) occurs, wherein the online relationships and different forms of online identity got enacted which in turn raises some significant questions on the social psychology in the use of the internet. The social psychology is important due to the relationships between the "online" and "offline" variety of interaction. Mr. S.K. Verma and Raman Mittal, have examined regulations of cyber world in their book *'Legal Dimensions in Cyberspace.'* The relationship varies between the "real world" and the "virtual world."[6] Cyberspace has given rise to a different cultural pattern as new media technologies have emerged. Thus Cyberspace is not only a tool of communications but is also a social destination and has cultural importance. Lastly, cyberspace provides new opportunities in reshaping both the culture and the society via the identities which are "hidden." Hence, cyberspace does not have any territories or boundaries where culture and communication of the people are concerned. The meaning of cyberspace alludes to not just the content being provided but ability to surf on different web sites and there is a constant feedback to the user and the rest of the computer network which also poses a danger that something which is unexpected or unknown may be countered. In cyberspace there is a difference between the videogames and communication which is text-based because the images which come on screen are actually figures which occupy a space and the movement of these images or rather figures is shown by animation. Thus images are meant to form a positive volume which defines the empty space. Thus the videogame adopts the cyberspace and engages several players in it. Thereafter the videogame in a figurative way represents these figures on the screen as replicas or avatars or avatar-players.

Cyberspace was referred as second life by a community in the virtual world called as Linden Lab which called its customers "Residents" of Second Life. Such communities can be referred for the comparative and explanatory objectives for instance by the author Sterling in *The Hacker Crackdown*, and several journalists who popularized cyberspace in the cyber-culture. Cyberspace has been used in the reasoning of novel military strategies across the world mostly led by the leaders in the US Department of Defense (DoD). However there are limits to the use of the metaphor cyberspace in areas where it gets confused with the physical infrastructure. It also has limitations in describing a computer network.

II. INFLUENCE OF THE COMPUTERS ON CYBERSPACE

[6]Andrew Pollack, "For Artificial Reality, Wear A Computer," New York Times, April 10, 1989, *available at*: http://en.wikipedia.org /wiki/Cyberspace#cite_note-12 (last visited on January 8, 2018). Also see, Marshall McLuhan & W. Terrence Gordon, *Understanding Media: The Extensions of Man* (Gingko Press; Critical edition, 2003). Also see, Robert Dunne, *Computers and the Law: An Introduction to Basic Legal Principles and their Application in Cyberspace* (Cambridge University Press, Cambridge, 2009).

William S. Burroughs (who is acknowledged for his literary influence on Gibson and cyberpunk) and Timothy Leary for the purpose of individual empowerment have extolled the potential of computers and computer networks.

Virtual reality (cyberspace) is used in various thought experiments by the contemporary scientists and philosophers such as David Deutschin *'The Fabric of Reality'.* Another example is Philip Zhai in *Get Real: 'A Philosophical Adventure in Virtual Reality',* in which he connected platonic tradition to cyberspace as follows:

> "Let us imagine a nation in which everyone is hooked up to a network of VR infrastructure. They have been so hooked up since they left their mother's wombs. Immersed in cyberspace and maintaining their life by teleoperation, they have never imagined that life could be any different from that. The first person that thinks of the possibility of an alternative world like ours would be ridiculed by the majority of these citizens, just like the few enlightened ones in Plato's allegory of the cave."

Cyberspace gets conflated with reality by the brain-in-a-vat argument, while more common explanations of cyberspace have contrasted it with the "real world". The concept of cyberspace has been popularized mostly in films and literature. Artists who are working with other media has shown interest in the concept, like Roy Ascott who states that "cyberspace in digital art is mostly used as a synonym for immersive virtual reality and remains more discussed than enacted".

Indian epics such as *Ramayana* written by sage Valmiki and *Mahabharata* written by sage Vyaas discuss the concepts of what we call 'Virtual reality' today. Those epics transported people and objects into the matrix and did web conferencing.[7]

Cyberspace has also been used to perpetrate corruption as it has brought almost all the services and facilities which one can imagine together to expedite operations such as money laundering.

Today on cyberspace one can easily buy false passports, credit cards which are anonymous, encrypted mobile telephones, bank accounts, and also false passports. On cyberspace one can pay the advisors to set up the corporations with anonymous ownership or IBCs (International Business Corporations) or structures such as OFCs (Offshore Financial Centers). The threat from cyber crime is multidimensional and there is a need to look for solutions.

In France a 5-level model of cyberspace was designed in 2010. It was composed of five layers. These layers relied on information discoveries such as printing, writing, language, Internet, etc. Thus, this model linked the telecommunication technologies world with the information technologies.

III. TECHNOLOGICAL ASPECT OF CYBER FORENSICS

People believe that the computational medium in cyberspace or virtual world is an amplification of the communication channel between the people in the real world. Taken as

[7] Nine unexplained miracles in India, *available at:* https: //www.indiatoday.in/education-today/gk-current-affairs/story/indian-mythology-311159-2016-03-12 (last visited on Sept. 5, 2018).

such the core feature of cyber forensics is that it acts in an environment which has many participants who have the ability to influence and affect each other leaving behind a trail of evidence.

The technological aspect of cyber forensic makes the electronic evidence admissible in court. Forensic analysis of the computer data is becoming more and more popular both in the areas of the cyber or computer security as well as the forensic science. Today there are various study courses in the universities dealing with the basics. Besides the fact that these universities also offer degrees and diplomas in computer science, there are also forensic software developers offering professional qualifications. With the passage of time, the free software programs are getting more and more advanced which is also reducing the costs incurred by the cyber forensics analysts.

THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

*Neha Aneja**

Afterwards signing and ratifying the "United Nations Convention on the Rights of Persons with Disabilities"[1](for brevity hereinafter UNCRPD) in 2007, Indian Parliament adopted a radically transformative piece of legislation, the "Rights of Persons with Disabilities Act, 2016"(for brevity hereinafter RPD Act)that addresses the concerns of arguably the most marginalised section of Indian society. This Act has repealed the earlier law on disability i.e. Persons with Disabilities (Equal Opportunities, Protection of Rights, and Full Participations) Act, 1995 and institutionalises a much-awaited robust rights regime in line with the principles of the UNCRPD. In addition to envisaging the economic, social, and cultural rights, RPD Act unequivocally contemplates civil and political rights of Persons with Disabilities (for brevity hereinafter PwD). It incorporates comprehensive range of the legal provisions in respect of equality and non-discrimination[2],community life[3], women and children with disabilities[4], reproductive rights[5], home and family[6], protection from cruelty and inhuman treatment[7], protection from abuse, violence and exploitation[8],access to justice[9], accessibility in voting[10], legal capacity[11], and provision for guardianship (where and to the extent needed) etc[12]. It guarantees full and effective participation and the inclusion of PwD in society and asserts the disabilities as part of human diversity. The RPD Act emulates a radical change in thinking about disability from a social welfare concern to a human rights issue. Thus, it is a landmark in struggle for equal opportunities for PwD in India. In *Justice Sunanda Bhandare Foundation* v. *Union of India and Another*,[13] Justice Dipak Misra remarked that RPD Act is a sea change in the perception and exhibits a march forward look with regard to PwD and roles of state governments, local authorities, educational institutes and companies are given thereto.

The RPD Act has broadened the definition of the term "Disability" by including inclusive of 21 conditions such as : "(1) Blindness, (2) Low-vision (3) Leprosy Cured persons

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[1] A/RES/61/106.
[2]Sec. 3 of the RPD Act.
[3]*Id.* at s. 5.
[4]*Id.* at s. 4.
[5]*Id.* at s. 10.
[6]*Id.* at s.9.
[7]*Id.* at s.6.
[8]*Id.* at s. 7.
[9]*Id.* at s. 12.
[10]*Id.* at s.11.
[11]*Id.* at s. 13.
[12]*Id.* at s. 14.
[13]2017 (5) SCALE 288.

(4) Hearing Impairment (deaf and hard of hearing) (5) Locomotor Disability (6) Dwarfism (7) Intellectual Disability (8) Mental Illness (9) Autism Spectrum Disorder (10) Cerebral Palsy (11) Muscular Dystrophy (12) Chronic Neurological conditions (13) Specific Learning Disabilities (14) Multiple Sclerosis (15) Speech and Language disability (16) Thalassemia (17) Hemophilia (18) Sickle Cell disease (19) Multiple Disabilities including deaf blindness (20) Acid Attack victim (21) Parkinson's disease".[14] These 21 conditions have been listed and defined in the schedule appended to the Act. It also provides that the Central Government may notify to add any other condition as disability under the schedule.[15]

The RPD Act incorporates the social model of disability as followed in UNCRPD and defines PwD as "a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."[16] PwDs have further been subdivided into two categories, namely, "persons with benchmark disabilities"[17]; and "persons with disabilities having high support needs"[18]. "Persons with benchmark disabilities" are defined as those certified to have at least 40 per cent of the disabilities specified above.[19] Such certificate of disability issued under the RPD Act shall be valid across the country.[20]

The RPD Act envisages the duty of educational institutions to promote and facilitate inclusive education and adult education.[21] It guarantees free education to children between the ages of six to 18 years, with a "benchmark disability" in a neighbourhood school or special school if required.[22] For persons with "benchmark disability", all government and government aided institutions of higher education are required to reserve at least five per cent of seats for persons with "benchmark disabilities".[23] Furthermore, PwDs are also entitled for relaxation in the upper age limit, by five years for admission in higher educational institutions.[24]

However, PwDs want to be productive members of society but employers are often reluctant to employ or retain the PwDs. Employment is a critical element of independent living but it is a major concern for PwDs as most of the PwDs are either unemployed or under employed.[25] In view of such negative attitude of the employers, RPD Act has extended protection by mandating all government owned or controlled establishments to reserve at least four per cent of posts for persons with "benchmark disabilities".[26] One per cent of this must be reserved for persons with "(i) blindness and low vision; (ii) hearing and speech impairment; (iii) locomotor disability; (iv) autism, intellectual disability and mental illness; (v) multiple disabilities." The government may exempt any establishment from this

[14] *Supra* note 2 at Schedule to s. 2 (zc).
[15] *Ibid.*
[16] *Id.* at s. 2 (s).
[17] *Id.* at s. 2(r): "person with benchmark disability" means a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.
[18] *Id.* at s. 2(t).
[19] *Supra* note 17.
[20] *Supra* note 1 at s. 58(3).
[21] *Id.* at ss. 16 and 17.
[22] *Id.* at s. 31.
[23] *Id.* at s. 32(1).
[24] *Id.* at s. 32(2).
[25] Rumi Ahmed, "Employment Security for Persons with Disability in India – A Critical Legal Understanding", 63 *Social Action* 315 (July-September, 2003).
[26] *Supra* note 2 at s. 34(1).

provision.[27] The central, state and local governments shall provide incentives to the private sector to ensure that at least five per cent of their work force is composed of persons with benchmark disability.[28] It also requires to give five per cent reservation for provided for persons with benchmark disabilities in "(i) allotment of agricultural land and housing in all relevant schemes and programmes; (ii) poverty alleviation schemes (with priority to women with benchmark disabilities); and (iii) allotment of land on concessional rate for purposes of business, enterprise, etc."[29]

The RPD Act address inter-sectional concerns of gender and age with disability. It adopts a twin-track approach in respect of the matter and provides dedicated and specific provisions for women and children with disabilities.[30] It also provides for representation of PwDs including representation of women with disabilities in the various bodies to be established under this new legislation, for example, in Central and State Advisory Board on Disability at least five members must be women.[31] The RPD Act addresses guardianship of PwDs in term of limited and plenary guardianship.[32] It guarantees accessibility for the physical environment, transportation, information and communications, including appropriate technologies and other facilities and services provided to the public in urban and rural areas.[33] It also makes mandatory to make existing infrastructure, premises and services accessible "within a period not exceeding five years from the date of notification of rules" under this Act.[34] It requires appropriate Government to conduct, encourage, support, and promote awareness campaigns and sensitization programmes to ensure that the rights of PwDs provided under this Act are protected.[35]

The new Act widens the ambit of social security provisions for community centres with good standard of living, support to women for livelihood, free healthcare in the neighborhood areas, rehabilitation, cultural and recreation, and sporting activities etc.[36] Provisions for PwDs in the event of situations of risk, natural disaster and humanitarian emergencies have also been made in the new legislation.[37] It also requires appropriate government to enable PwDs to access to any court, tribunal, authority, commission or any other body having judicial or quasi-judicial or investigative powers without discrimination on the basis of disability.[38] It also provides provision for free legal aid for PwDs.[39]

The PwDs encounter discrimination in almost every sphere of their life and it has been rightly asserted by Patrisha Wright that "all disabled share one common experience – discrimination."[40] Such agony of the PwDs has been acknowledged under the RPD Act and it prohibits discrimination against any person with disabilities on the ground of disability unless

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[27] *Ibid.*
[28] *Id.* at s.35.
[29] *Id.* at s.37.
[30] *Id.* at s.4.
[31] *Id.* at ss.60 and 66.
[32] *Id.* at s.14.
[33] *Id.* at s.40.
[34] *Id.* at s.45.
[35] *Id.* at s.39.
[36] *Id.* at s.24.
[37] *Id.* at s.8.
[38] *Id.*at s.12.
[39] *Id.*at s.7(4)(c).
[40] As quoted by Howard Sklar, "Empathy's Neglected Cousin: How Narratives Shape Our Sympathy" in Donald R. Wehrs, Thomas Blake (eds.), *The Palgrave Handbook of Affect Studies and Textual Criticism* 458 (Palgrave Macmillan, Cham, 2017).

it is shown that such impugned act or omission is appropriate to achieve a legitimate aim.[41] The term discrimination in relation to disability has been defined to include any distinction, exclusion, restriction on the basis of disability which impairs or nullifies the exercise on an equal basis of rights in the "political, social, cultural, civil or any other field".[42] Furthermore, under RPD Act any kind of discrimination, insult, intimidation, assault, humiliation and sexual exploitation of the PwDs is punishable with imprisonment between six months to five years and fine.[43] Along with that, RPD Act provides that violation of any provisions of the Act, or any rule or regulation made under it, shall be punishable with imprisonment up to six months and/or a fine of Rs 10,000, or both. For any subsequent violation, imprisonment of up to two years and/or a fine of Rs 50,000 to Rs. five lakh can be awarded.[44]

The RPD Act provides provisions for establishment of national and state funds for empowerment of PwDs. The Central Government shall constitute a Central Advisory Board[45], and state governments shall constitute a State Advisory Board each,[46] for disability matters. State governments shall also constitute District-Level Committees.[47] The functions of these advisory boards will include: "(i) advising the government on policies and programmes with respect to disability; (ii) developing a national/state policy concerning PwDs; (iii) recommending steps to ensure accessibility, reasonable accommodation, non-discrimination, etc."[48]

The current RPD Act reinforces the regulatory, monitoring, and grievance redressal mechanisms in terms of their functions and composition. The Office of Chief Commissioner and State Commissioners of PwDs have been given more powers.[49] It also stipulates designation of special court at the district level for fast tracking cases of PwDs under the RPD Act.[50]

With above stated provisions, it is clear that the RPD Act has been enacted very efficiently and with a vision to empower the PwDs. However, law is one of the various tools of social change and not an end in itself. The test currently lies in the successful implementation of the RPD Act, failing that the guarantees and protections it offers are going to be nothing however hollow guarantees on paper. While emphasising on the duty of the Union and State Government to implement the RPD Act the Supreme Court has rightly pointed out that:

> "…The States and the Union Territories must realize that under the 2016 Act their responsibilities have grown and they are required to actualize the purpose of the Act, for there is an accent on many a sphere with regard to the rights of the disabilities. When the law is so concerned for the disabled persons and makes provision, it is the

[41] *Supra* note 2 at s.3(3).
[42] *Id.* at s.2(h).
[43] *Id.* at s.92(a).
[44] *Id.* at s.89.
[45] *Id.* at s.60.
[46] *Id.* at s.66.
[47] *Id.* at s.72.
[48] *Id.* at ss.65 and 71.
[49] *Id.* at ss.77 and 82.
[50] *Id.* at s.84.

obligation of the law executing authorities to give effect to the same in quite promptitude…"[51]

[51]*Supra* note 13 at para 24.

EMPIRICAL RESEARCH ON MEDIATION

*Ashutosh Mishra**

"I realized that the true function of a lawyer was to unite parties...The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about the private compromise of hundreds of cases. I lost nothing thereby not even money; certainly not my soul."

M.K. Gandhi

I. INTRODUCTION

A novel course of action is required to complement the traditional judicial system in order to reduce the heavy burden of litigation without compromising with the standard of equity, justice and good conscience. Alternative Dispute Resolution (ADR) is a tool to achieve the aforementioned goal of speedy, equitable and adequate justice. This becomes pertinent because a traditional approach has not been able to solve the chronic problem of delayed justice. In a welfare state like India, social justice occupies a preeminent position and may be regarded even more important than economic equality. ADR is such a creative approach, which will help in achieving social justice by securing faster and adequate justice for the masses so that the true meaning of Justice is realized.

In India, which is developing, a substantial number of people belong to marginalized, deprived, destitute classes and are not so economically sound to knock the doors of the judiciary as the cost of litigation is huge. Therefore innovative methodology of ADR can help secure justice to the masses. Other advantages like cost minimization and peaceful resolution of the dispute without bitterness can also be achieved which may not be possible in the traditional litigation approach as well as others ADR methods.

'Access to Justice' means an ability to participate in the judicial process. The seeker of justice should not be a passive onlooker but needs to participate actively so that he is a real constituent of the whole process. Spectrum of dispute resolution is very wide; it can include methods with varying degree of sanction. As the society grew and became more complex, informal decision-making process became more difficult on account of the expanse and nitty-gritty of the whole process, thereby necessitating the designing of a formal judicial system. This became a prerequisite for maintaining order in a growing society thus helping trade and commerce to flourish along with the governance systems

Mediation as a form of alternative dispute resolution is imparting justice in a cost-effective manner in the present justice delivery system. Mediation is purely based on amicably settlement of dispute and neutral third person intervenes in the settlement process on the basis of neutrality, confidentiality, flexibility. With respect to the process Mediation is different from adversarial system. In adversarial justice system both the parties try to argue

and put evidences against each other whereas in the case of pacific settlement instead of adjudication or deciding right and wrong third-party endeavors to resolve the dispute and resume the cordial relationship between the parties.

II. Statement of Problems

(i) Due to education and increase in the literacy rate the awareness of people for their rights has increased and common people have become more enthusiastic and concerned for their rights and this has resulted into the institution of a large number of cases.
(ii) We cannot expect expeditious justice from overburdened judiciary.
(iii) Now in recent years large number of statutes have been enacted and they have provided many rights to the citizen of this country. For example, Right to Information Act 2005has given many rights to the common citizen of this country and it has resulted into institution of a huge number of cases.
(iv) There is lack of judicial infrastructure in the country. For example, the number of the judges, number of courts, number of judicial staff, etc. in the country.

In its 120thReport in 1988, the Law Commission of India had recommended that "the State should immediately increase the ratio from 10.5 judges per million of Indian population to at least 50 judges per million within the period of next five years." According to the national judicial data grid the High Court had a pendency of around 2.89 lakh cases in 2016, which rose to 3.19 lakhs in 2017. Sources say that because of shortage of judges, the pendency has touched around 3.89 lakh cases at present.

The ratio of the judges in the country is abysmal low and many special courts are not functioning due to lack of judges. Right to get expeditious justice cannot be granted unless and until government ensure there is appointment of judges in effective manner.

III. Objectives of the Study

1. To study the level of awareness amongst common people regarding mediation.
2. To study the effectiveness of Mediation.
3. To analyze whether Mediation is successful or not?

Mediation as a form of alternative dispute resolution is playing a proactive role but we have to ponder and introspect how many people know about mediation. In this research paper I am showing how many people know about mediation. It is empirical research based on random sampling method on the basis of questions asked.

IV. Research Methodology

Mainly research was doctrinal but for assessing the working of mediation, empirical research is indispensable. In order to make the study broad based, it was found indispensable to conduct field studies.

Mediation is a complicated process and has several inter-linkages in its enforcement. A proper understanding of these interlink ages requires that we have a first-hand insight into

the process of enforcement. It is for this purpose that the researcher selected people for his primary empirical research from fields ranging from law students, common people, police officials, lawyers and judges.

As the information sought was of varied nature, therefore necessary and appropriate research tools were employed. These included interview of the selected respondents, survey of documents in the library and state archives, and non-participant observational method for the collection of relevant data. Internet was very helpful to find new progress in the specified field. The field work was done at a stretch on the basis of samples. Interview schedule scheme was adopted to collect the relevant data. The data so collected was analysed by using social science research technique.

V. FINDINGS OF THE STUDY

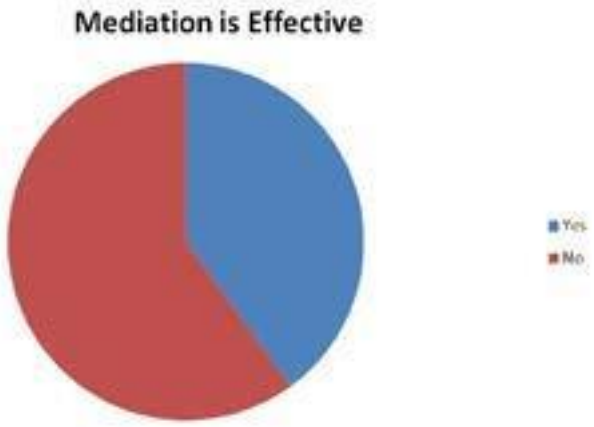
India is country with huge number of litigation pendency and country is facing the menace of litigation explosion. Being amongst most populated country it is not expected from the government to popularize the concept of mediation and other alternative dispute resolution very easily although the Supreme Court of India and government is putting a lot of efforts. In India most of the people are unaware about mediation and due to lack of awareness people are more inclined towards adversarial form of justice delivery and not enthusiastic enough to opt mediation as a process for justice delivery system. Whenever we compare with any developed country the result of mediation in India is disappointing, reason behind this is lack of awareness.

This research is based on a survey of common people, Advocates, Law students and judges of Mega-Metropolitan cities (500 each). The data collected to accord the respective questions is based on a questionnaire and telephonic conversations. The results of this survey clearly depict that there is a lack of information among the local population along with the legal fraternity and law practitioners about the mediation techniques, skills required for negotiation as a form of dispute resolution that is available and the benefits it offers.

Question: Do you think mediation is effective for alternative dispute resolution?
Advocate/parties: Delhi, Mumbai, Kolkata, Chennai, Hyderabad, Bangalore.

Total Number of Respondent: 5000

Yes: 40 %No: 60 %



Analysis: The above figure tells the story in a way that almost 60%of the advocates are not in favour of settling disputes through mediation process while among the 40% of advocates who are willing to opt this modern means of settling the dispute, are also suspicious about this mode of ADR.

The reasons behind such unwillingness can be summed in a few questions asked:

1. Common people are not sure how mediation is effective.
2. Litigants are unaware about benefits of mediation.
3. One of the party to dispute is so miserable and destitute that he cannot decide about mediation
4. One of the parties among the litigants is uncooperative and insensitive.
5. Lack of trust between both the parties.
6. Perception among the parties is that their case is unsuitable for mediation.
7. Perception is that their case is too complex to resolve through mediation.
8. Parties are not in favour of compromise.
9. If one of the parties suggest or inclined for mediation other will frame his mind that he is weak and coward.
10. Remuneration or payment to mediator.
11. How the mediator behaves and what are the qualifications of mediator.
12. How to choose mediation.
13. Communication gap between the parties.
14. Issues involve family disputes and domestic violence which are private in nature and third-party intervention is not feasible without their active support.
15. Unwillingness of the parties to pay for mediator.
16. Negative suggestions of the parties.
17. Lawyers are not inclined for mediation.
18. If the mediation is not successful then what would be the next approach.
19. The conflict of the parties cannot be solved easily and it can go long away.
20. Parties say that they have not a good experience with mediations and it is not successful process
21. Rigidity among the parties for mediation.

Thus, in the light of the abovementioned questions we see a few important issues which need to be addressed by the Advocates and parties satisfactorily. Thereby, effective mediation process as an ADR does not seem to be successful. At the end of the day, it may be concluded that if these issues are suitably sorted out by taking proper care of the spatial needs and requirements of the Advocates/Parties, then the mediation process is effective in our Nation.

Judges: Delhi, Mumbai, Kolkata, Chennai, Hyderabad, Bangalore

Total No. of Respondent: 200

Yes: 85 %No: 15 %

Analysis: The above fig. tells the story in a way that almost15% of the Judges are not in favour of settling the disputes through mediation process while among 85% of Judges are willing to opt this modern means of settling the dispute through mediation and as mode of ADR. Concept of referral judges is playing a proactive role in present scenario. In court annexed mediation judges are *sine quo non* and they are skeleton to initiate the process. Reference is pre-requisite to initiate the case. Referral judges refer the case to mediation to settle the case amicably. While referring the case judge can play a very proactive role through communicating benefits of the mediation to the parties and encourage parties to opt for mediation as it is cost effective and effective also. While referring the case judge must take into consideration that all cases relating to life and liberty, against the society at large, having severe punishments are not suitable for mediation.
Whether the case is appropriate to be referred by the judge is primarily based on judge. Judge on the basis of his own experiences and skill can decide whether it ought to be sent to mediation or not. In the case of referral concept there is active participation of all parties and all the stake holders.

Section 89 of the Civil Procedure Code 1908provides that, "Where it appears to the court that there exist elements of settlement" this clearly shows that cases which are not suited for ADR process should not be reoffered to ADR under section 89 of CPC. The court has to use their own judicious mind, whether the case is capable of being referred to and settled through ADR. Where the case is not suitable to refer to an ADR process in that case judge will briefly record the reason for not resorting to any of the settlement procedures prescribed under section 89 of the Civil Procedure Code 1908.

Section 89 of the Civil Procedure Code 1908 was enunciated with the intention that where it appears to the court that there exists an element of settlement which may be acceptable to the parties, they at the instance of the court shall be made to apply their mind so as to opt for one or the other of the four ADR methods mentioned in the section.

Now, in the courtroom if the judges counsel both the parties and inform them about the ADR methods, then the parties are willing to settle the matter amicably. Although, in India, more than 3 Crores cases are pending or under trial before the Apex court, different high courts, district courts, CAT, NGT, tribunals, consumer courts etc. Thus, every State govt. and Central govt. may appreciate the judges, to refer the cases to mediation or an ADR for the benefit or interest of the common people. In our constitution, the cardinal aim is "to deliver the justice, to the downtrodden citizen within reasonable time and expenses in a proper manner." Otherwise, delayed justice means denied justice.

MATRIX OF THE RIGHT TO PRIVACY CASE

*Niraj Kumar**

I. INTRODUCTION

In Justice *K S Puttaswamy (Retd.)* v. *Union of India*[1](henceforth referred as the right to privacy case), a nine-judge bench[2] of the Supreme Court unanimously ruled that there is a fundamental right to privacy under Article 21 of the Indian Constitution and the same is intrinsic to one's life and liberty. The verdict that runs into more than 500 pages and constitutes of six different judgments explicitly overrules the *precedent* that right to privacy is not protected under the Indian Constitution set by *M.P. Sharma*[3] and *Kharak Singh.*[4]

Although the case resulted into unanimous declaration of right to privacy as a fundamental right, but it is significant to note the reference as stated by the lead judgment of Justice Chandrachud et al. It elaborates, "Nine Judges of this Court assembled to determine *whether privacy is a constitutionally protected value* (emphasis added). The issue reaches out to the foundation of a constitutional culture based on the protection of human rights and enables this Court to revisit the basic principles on which our Constitution has been founded and their consequences for a way of life it seeks to protect. This case presents challenges for constitutional interpretation. If privacy is to be construed as a *protected constitutional value* (emphasis added), it would redefine in significant ways our concepts of liberty and the entitlements that flow out of its protection."[5]

II. THE JUDGMENT

The lead judgment penned by Justice Chandrachud on behalf of CJI Khehar and Justices Agrawal, Nazeer and himself, held that though in M.P. Sharma the Court did not find right to privacy as one of the enumerated rights under Article 20(3) of the Constitution, but, at the same time, it was silent on its presence under any other provision of the Constitution. Similarly, in their view, the Court in *Kharak Singh* recognised that right to life had an expansive meaning, but went astray while declaring that right to privacy isn't a guaranteed right under the Constitution. According to them, right to life and personal liberty predates the Constitution and right to privacy owes its genesis to this right as it is the core of human dignity performing both normative and descriptive functions. In their view, right to privacy has both positive and negative contents, and therefore, the state is under an obligation not only not to violate such rights but also protect it from being infringed by non-state actors.

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[1](2017) 10 SCC 1.

[2]The Bench comprised of Chief Justice Khehar and Justices J. Chelameswar, S.A. Bobde, R.K. Agrawal, Rohinton Nariman, A.M. Sapre, D.Y. Chandrachud, Sanjay Kishan Kaul and S. Abdul Nazeer.

[3]*M. P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300.

[4]*Kharak Singh* v. *State of UP*,AIR 1963 SC 1295.

[5]*Supra* n.1 at 346.

However, they also agreed to the fact that like any other right under the Constitution, right to privacy is not absolute.[6]

Justice Chelameswar in addition to concurring with others on the right to privacy being a fundamental right, puts an emphasis on contextual interpretation of right to privacy. He also surmises the bleak possibility of such right being traced to any other Article than Article 21 of the Constitution. But at the same time, he suggests that the kind of restrictions which can be imposed on right to privacy will also depend upon its nexus with other constitutional provisions. While primarily relying upon just, fair and reasonable being the tests for restrictions he also throws US doctrines of 'strict scrutiny' and 'narrow tailoring' in the mix.[7]

According to Justice Bobde, right to privacy is a constitutionally protected right under Part III of the Constitution and is inextricably attached to some specific articles and residuary under Article 21. As per him, any restriction on right to privacy by any entity covered by the state has to be specifically justified under specific provisions of the Constitution. It appears Justice Bobde hasn't elaborated much upon its violation by non-state actors.[8]

In addition to the route followed by other judges, Justice Narimanemphasises on international instruments to buttress his decision. He also emphasises on inalienability part of right to privacy by suggesting that the impact of the 44th amendment has also brought to fore the same understanding on inalienability. He is also of the opinion that the later judgments took away the vigour of *M. P. Sharma* and *Kharak Singh.* Justice Nariman also traces the shift in statutory positions by comparing Section 26 of Indian Post Office Act, 1898 with Section 8 of the Right to Information Act, 2005 to suggest that over the period of time even legislature has started recognizing right to privacy as an important right.[9]

Justice Sapre invokes the Preamble to emphasise right to privacy. In his opinion by the use of words like dignity, liberty, freedom the Preamble has primed certain rights of people of India and right to privacy will fall in that bracket.[10]

Justice Kaul, agreeing with others, reiterates that right to privacy is not only a fundamental but a natural and common law right too. He emphasises the need for right to privacy in the light of life of technological milieu. He also sounds the needs of such protection against non-state actors. He is of the view that since Constitution is a living document therefore it requires a progressive interpretation in the light of changing realities. He also lays down ways to control the discretion so that the right isn't compromised.[11]

III. CONCLUSIONS

A typical feature of common law countries is that judgments not only decide individual cases but are precedents for future ones.[12] In the immediate case, it was a reference

[6] *Id.* at 508-510.
[7] *Id*. at 510-533.
[8] *Id.* at 533-549.
[9] *Id.* at 550-611.
[10] *Id.* at 611-616.
[11] *Id.* at 617-636.
[12] See, Mathias Siems, *Comparative Law* 57 (Cambridge University Press, 2014)

about certain questions of constitutional interpretations. Therefore, it didn't decide any matters at hand, but, at the same time, it purports to have done much more. It has a potential to decide definitively not only the case in the context of which the reference was sent, but also many more pending cases. For example, it will have an overbearing presence over the curative petition pertaining to the constitutionality of Section 377 of the Indian Penal Code, 1860[13] because of liberal references to the matter of homosexuality and sexual preferences in the context of privacy by the Court in its judgment. It also appears from the observations made by the Court in the Right to *Privacy case* that a lot of contextual interpretations will be done in cases concerning privacy.

Further, there is pervasive presence of phrases like 'Constitutional values', 'non-state actors', 'informational privacy', and 'horizontal application of rights'. These phrases will take lot of space and time of the Courts in future discourse pertaining to right to privacy. In present times we are living in the age of big and *meta* data. Many of these aren't in possession of or in custody of the state. Therefore for proper discharge of its positive obligation of protection of the right to privacy, as laid down in the privacy case, the state will have to take up the responsibilities which it was shedding with the advent of liberalisation. Therefore, it would not be wrong to say that by the privacy verdict, the Court had decided to paint a very wide canvas with a very wide brush.

[13]See, Curative petition in *Suresh Kausal* v. *Naz Foundation*.

INDEPENDENT THOUGHT v. UNION OF INDIA: A CRITICAL COMMENT

*Latika Vashist**

On October 17, 2017, the Supreme Court of India, in *Independent Thought* v. *Union of India*[1]held that sexual intercourse between a man and his wife aged between 15 to 18 years is rape. The judgment which was prospective in effect thus read down the marital rape exception. The State had defended the exception on the grounds that child marriage, though illegal vide Prohibition of Child Marriage Act (PCMA), continues to be a stark reality and the sanctity of the institution of marriage needs to be preserved. Rightly rejecting both these arguments, the Court declared the exception arbitrary and discriminatory and thus violating Articles 14, 15 and 21 of the Constitution.

The Court refrained from making any comments on the marital rape exception; instead it framed the issue in reference to the ill-effects of the practice of child marriage. It was emphasized that child marriage violates the human rights of a child and is particularly detrimental to the rights of the girl child, the right to bodily integrity, reproductive choice and "the right to develop into a mature woman", amongst others.

The Court through this decision sought to address a glaring anomaly in the age of consent law: while the Protection of Children from Sexual Offences Act (POCSO Act), 2012, prescribes the age of consent as 18 years for both male and female, the rape law provision in the Indian Penal Code postulated 15 years as the age of consent for married girls. Thus, in law, consensual sex by an unmarried girl below 18 years is deemed to be without consent, but if a girl is married, even when she does not consent to sexual acts with her husband, it will be presumed to be consensual.

In other words, a girl below 18 years, otherwise unable to give consent, is presumed to have consented to her husband for all sexual acts, at all times. This discrepancy, the Court held, is preposterous given the "interest of the child", especially the girl child. Moreover, such inconsistency cannot stand, especially in view of section 42A of the POCSO which provides that in case of any inconsistency, the provisions of POCSO would override other laws.

According to the Court, the legislature is categorical and unambiguous that anyone below the age of 18 years is a child. The increase in the age of consent to 18 years in the 2013 Criminal Law Amendments is in tune with various other enactments such as the POCSO Act, the Juvenile Justice (Care and Protection) Act, 2015 the Protection of Women from Domestic Violence Act, 2005, the Majority Act,1875, the Prohibition of Child Marriage Act, 2006, the Guardians and Wards Act,1890, the Indian Contract Act,1872 and many other laws.

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[1]Writ Petition (CIVIL) NO. 382 OF 2013.

While this decision has been applauded and seen as a dent in the marital rape exception, it remains embedded in the larger objective of the regulation of female sexuality. It is important to note that in all its talk of the rights of the girl child, there is no mention at all of the right to sexual agency, within or outside marriage. In fact, the Court uncritically buys into and consolidates the notion of a child/adolescent as an asexual being, also problematically encoded in the POCSO Act, and the girl/woman as mere object of male sexuality and not the subject of one.

The slippages and contradictions in the Court's understanding of the figure of the (girl) child are too glaring to be overlooked: while Justice Madan Lokur approvingly cited a study by the Government of India on child sexual abuse stating that "minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality"[2], concurring Justice Deepak Gupta emphasised that "the girl child must not be deprived of her right of choice…[and] her right to develop into a mature woman."[3]

Both the judges subscribe to the age of sexual consent as postulated in the POCSO Act. In the zeal to save the girl child from the oppression of marital sex, the Court sidetracked the issue of familial violence, through age of consent laws, on adolescents who sexually express themselves. The slippages in lacking "the ability to control their sexuality" (which admits to sexual desires below 18) and the question of "choice" (which does not specify choice to what and surely must include the right to sexual expression before and outside marriage) are papered over with the rhetoric of victimisation with no serious thought to the sexual agency of the young, and further strengthens the idea that a girl below the age of 18 years is incapable of consent.

For the Court, there is no space for sexuality outside marriage. By collapsing all sexual intercourse into intercourse within heterosexual marriage, the Court left no space for non-procreative, out-of-marriage sex between young people which, interestingly is seen as a threat to the state. Moreover, in reducing sexual intercourse even within marriage to the economistic logic of a burden on the nation, the Court neatly sidesteps both the issue of the mental and physical costs of marital rape that are borne by women above 18, in the artificial distinction they endorse between marital rape victims above 18 years and those less than 18 but, more importantly, of any sexual agency both within and outside of heterosexual marriage and certainly below the age of 18.

At best, this decision is a step towards the abolition of heterosexual child marriage (the Court calls upon all state legislatures to follow the example of Karnataka and declare child marriages to be void *ab initio*). However, it would be fallacious to conclude that it has created a dent in the marital rape exception, even though the marital rape exception in criminal law is read down in the specific case of child marriages.

The reading down is not because minor wives are accorded equal rights as subjects or in the marriage, but because the minor wives were not *really* wives in the first place (Justice Gupta use the terms wife and husband in quotation marks to refer to marriages of girls less than 18 years, suggesting they are not really wives and husbands). They are sexless children on whom sexual intercourse will be an act of violence with the possible unfortunate effect of malnourished children. Despite the language of choice, this is not about choices before the

[2] *Id*. at para 16 (Lokur J).
[3] *Id*. at para 70 (Gupta J).

girl as an independent subject at all. She is merely the object of male sexuality, not ready for sexual activity and the reproducing of children just yet. What the Court naively termed as mere inconsistencies in different legislations on the age of consent and marriage, is actually reflective of the State's overt interest in the preservation of the institution of heterosexual marriage as the only vocation for the girl/woman, on the one hand, and the regulation of all young, especially female sexuality on the other.

While the marital exception (even for child marriages) is crafted to safeguard the patriarchal and sexist logic of the institution of heterosexual marriage, the increased age of consent only reflects the anxiety of the State around adolescent and child sexuality and not any concern for the choices or sexual agency of the young, especially girls/women. Throughout the judgment, the discussion on the age of consent has been tied to adulthood in relation to marriage, completely erasing questions of the sexual agency of the young, especially girls and women who are, once again, mere objects of the law, both within and outside marriage.

ARE WE REALLY SERIOUS ABOUT WOMEN'S DIGNITY? LET'S WAIT AND WATCH

*Jyoti Dogra**

Sexual intercourse *per se* is not an offense. It becomes an offence when the consent of the woman is not there. The pre 2013 criminal law did not define consent but post 2013 it means, "unequivocal voluntary agreement" which is to be communicated either through words or gesture. The amendment while making very significant changes in the rape provisions chose to retain the marital rape exemption and made it more appalling by declaring that not only sexual intercourse but "sexual acts by a man with his own wife" will not be considered rape. It may be axiomatic to mention that feminists had worked very hard to widen the definition of rape and took it beyond the patriarchal parameters of peno-vaginal assaults.[1] But within the institution of marriage, where patriarchy is most blatantly practiced, the woman is left to suffer all kinds of sexual acts which Maya John describes as 'bad sex' and where there is total disregard of both her feelings and bodily autonomy.[2] The wives below 15 years of age (in a country where there is Child Marriage Restraint Act) were mercifully exempted from the exemption. When Macaulay drafted the Penal Code for this country, he was heavily influenced by Victorian values and since one of the constitutive elements of marriage is sex, so it was assumed that once a woman consents for marriage she no longer has a right of bodily integrity. As Sir Mathew Hale bluntly stated that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind to her husband, which she cannot retract". This clearly is a case of inverted logic and projects a chattel-master sort of a relationship rather than a relationship of equality and dignity. It was a case of human dignity (in case of women) being made subservient to the institution of marriage. Many jurisdictions across the globe have done away with the regressive marital rape exemption. It is true that marital rape will be difficult to prove, but one must not forget the normative function of law. It declares norms and the societal members are incentivised (or deterred) to conform to these declared norms. In the pre 2013 position only penile/vaginal penetration was exempted and I want to believe that procreative logic of marriage was taken seriously.[3] But now the rape definition is not constricted by penile penetration but extends to many non-procreative sexual acts. And so I say it with conviction that the bodily autonomy and dignity rights of a woman have been totally compromised (not to say it was partial earlier) in the Amendment Act. The Apex Court of the country had the chance to set things right. The chance came in the form of a writ petition - *Independent Thought* v. *Union of India.*[4]The issue was "whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape?" Two issues need to be highlighted. *Firstly*, the issue was only 'sexual intercourse' and not 'sexual acts' (which also is now included in the exception). *Secondly*, the marital rape exemption was not challenged but the age factor *i.e.* 15

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[1]Flavia Agnes, "Protecting Women against Violence? Review of a Decade of Legislation 1980-89", 27(17) EPW 13 (25th April,1992).

[2]Maya John, "Class Societies and Sexual Violence: Towards a Marxist Understanding of Rape", *available at:* http://radicalnotes.com/tag/maya-john (last visited on Feb. 21, 2018).

[3]See Carol Smart, *Law, Crime and Sexuality* 41(Sage Publications, 1995).

[4]Writ Petition (Civil) No. 382 of 2013.

years was under scrutiny. The Court benevolently taking help of the Protection of Children from Sexual Offences Act (POCSO Act) 2012 declared that this exemption creates "an unnecessary and artificial distinction between a married girl child and an unmarried girl child". The Court kept reiterating that it was not dealing with the issue of "marital rape not even collaterally". But all the arguments in the judgment are against the whole exemption and not one part as the court would want us to imagine. For example, Hale's principal has been derided which considered woman as chattel where in it "was presumed that on marriage, a woman had given her irrevocable consent to have sexual intercourse with her husband".[5] The privacy argument was put forth by the intervener and the court almost apologetically confessed that it had "purposely not gone into this aspect of this matter".[6] Why not is the big question? Why did the Court then enter into the matter at all? The justification of the court was to bring this exemption into consonance with the Constitution and POCSO Act. As far as the Constitution is concerned, the entire marital rape exemption is violative of Articles 14, 15 and 21 and not just the 15 year part! So how did the court sever an exemption and dealt with the latter part, even when they are empowered to do "complete justice" by the very Constitution which they were invoking. Talking of 'consonance', I beg to submit that one cannot have harmonious construction of different Acts when each Act has its own objects and reasons for its enactment. Hence the *Independent Thought* judgment is deeply flawed.

And as the argument goes for marital rapes, the same will be true for marital rape below 18, that the quantum or rate of conviction would be dismal. The court through this judgment almost endorses Saptarishi Mandal's assertion that 'the law kicks in to regulate sexual violence in marriage only in cases when it is accompanied by extreme physical violence or when the health and safety of the wife is endangered as in cases of minor wife'.[7] And hence stayed away from the larger issue of marital rape!

This issue of woman's dignity in marriage and bodily autonomy is now before the Delhi High Court where the RIT Foundation and the All India Democratic Women's Association are arguing that not recognising marital rape as an offence violates a woman's right to access to justice. The women have pinned their hopes on the Delhi High Court, which has had a stellar record. Fingers crossed!

[5] *Id*. at para 72.
[6] *Id*. at para 86.
[7] Saptarishi Mandal, "The Impossibility of Marital Rape" in *Australian Feminist Studies* (Published Online Oct. 23, 2014).

UNFCCC DETOUR: A SNAPSHOT

*Arvind Jasrotia**

Climate change is the defining human development challenge for the 21st Century that represents the greatest existential threat for humankind and non-human nature.[1] Justice and equity claims have been the major part of the climate change discourse so that considerations of fairness are incorporated into efforts to protect global climate change and to prevent socio-economic policies that are antithetical to sustainable development.The United Nations Framework Convention on Climate Change (UNFCCC) in its preambular assertion contains a recognition that "the largest share of historical and current global emissions has originated in developed countries, that per capita emissions in developing countries are still relatively low and that share of global emissions originating in developing countries will grow to meet their social and development needs".

In its quest for climate justice, the principle of Common but Differentiated Responsibilities and Respective Capabilities (CBDR-RC) has reflected a lasting political consensus with widest possible co-operation by all countries to combat climate change with shared responsibility. CBDR-RC establishes unequivocally the common responsibility of States for the protection of the global environment but builds on the acknowledgment by industrial countries that they bear the primary responsibility for creating the global environmental problem by taking into account the contributions of States to environmental degradation in determining their levels of responsibility under the regime.[2] This dynamic differentiation is reflected in the structure of UNFCCC as well as in the Kyoto Protocol whereby developed countries agreed to an average emission reduction of 5 percent below 1990 levels. The further differentiation through CBDR-RC was evident in Bali Action Plan which envisioned 'measurable, reportable, and verifiable' mitigation 'actions or commitments' by developed countries. The Nationally Appropriate Mitigation Actions (NAMAs) did not constitute binding obligations for developing countries in contrast to those of developed countries. With the Copenhagen Accord and Cancun Agreements, the parties established a parallel 'bottom-up' framework,[3]with countries undertaking national pledges for 2020 thereby attracting broader participation, including, for the first time, specific mitigation pledges by developing countries. The recently concluded Paris Agreement reflected a 'hybrid' approach blending bottom-up flexibility, to achieve broad participation, with top-down rules, to promote accountability and ambition. The Agreement strikes a delicate balance between collective ambition of global efforts to lower GHG emission, differentiation between developing and developed countries and mobilization of financial resources needed for support. The Agreement ends the strict differentiation between developed and developing countries that characterized earlier efforts, replacing it with a

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[1] *Available at:* http://www.dailyexcelsior.com/conference-climate-change-sustainable-development-concludes/ (last visited on Feb. 10, 2019).

[2]*Available at:* http://www.cprindia.org/system/tdf/policy-briefs/1253776076-PolicyBrief.pdf?file=1&type=node&id=3453&force=1 (last visited on Feb. 10, 2019).

[3]Edwar Saja Sanneh, *Systems thinking for Sustainable Development* 60 (Sringer Nature, New York, 2018).

common framework that commits all countries to put forward their best efforts and to strengthen them in the years ahead.[4] Many provisions establish common commitments while allowing flexibility to accommodate different national capacities and circumstances, either through self-differentiation, as implicit in the concept of nationally determined contributions (NDCs) or through more detailed operational rules still to be developed.[5] Transparency is the watchword in the Paris Agreement for holding countries accountable. Further, the developed countries are committed to provide finance for mitigation and adaptation in developing countries.

[4]*Available at:* https://www.c2es.org/content/cop-21-paris/ (last visited on Feb. 10, 2019).
[5]*Ibid.*

THE POLITICAL TENSION SUBVERTING RULE OF INTERNATIONAL LAW: ANALYZING *KULBHUSHANJADHAV'S* CASE

*Ajay Tambulkar**

> *"...the International Court rose to the occasion and did what it could in such short notice. We have saved a person from the gallows. This will prove to be a very important case for the jurisprudence of human rights."*[1]
>
> Justice Dalveer Bhandari

The quote underlines the opinion of International Court of Justice, Judge Dalveer Bhandari on Kulbhushan Jadhav's case after granting interim order of stay on execution. The dramatic secret incidents and unexpected political events that took place during Kulbhushan's case go beyond the fictitious story like Agents of Innocence. The case is not first of its sort; there is a long history of accusations and convictions (with/without evidence) of Indian nationals by Pakistan on the charge of spying and espionage. From Kashmir Singh to well known Sarbjit Singh and present Kulbhushan Jadhav, there are numerous incidents of such deliberate allegations backed with political propaganda.

The case stands one more example in the course of tense bilateral Indo-Pak relations. India's resort to international law process and Pakistan's propaganda of holding an Indian as spy or terrorist and thereby spreading enmity can be observed from unpredictable and opaque events taking place in Kulbhushan's case. Secret trial and conviction of Kulbhushan amounted to gross violation of International Law provisions.[2]

In response to Pakistan's arbitrary conviction the Indian government responded heavily warning not to execute Kulbhushan as it will be held 'pre-mediated murder' devoid of rule of law and natural justice. The Indian national Kulbhushan is retired Naval officer thus, now he is an ordinary civilian. Trying a civilian in Martial Courts raises substantive questions on 'intention' and 'procedural validity' of the entire trial conducted by Pakistan. If one Dissects and understands the problem thoroughly, analyses its myriad angles the solution lies within the problem. With this approach, to resolve such complex and sensitive politico-legal issue, India approached the World Court challenging the trial conducted and conviction of Kulbhushan. Pakistan questioned the jurisdiction of ICJ by taking the defence of bilateral agreement concluded in 2008. ICJ recognised the merits of the case and having jurisdiction[3] under Optional Protocol to Vienna Convention concerning Compulsory Settlement of Disputes as well as jurisdiction to try contentious cases between states. India invoked jurisdiction under Article 36(1) of Convention.

India internationalised the issue by its actions; the boycott of SAARC summit hosted by Islamabad, postponing maritime talk, approaching International Court of Justice and

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[1]Ritu Sarin, "Flew from all over, saved man from gallows: Justice Bhandari" *The Indian Express*, May 19, 2017.

[2]Vienna Convention on Consular Relations, 1963.

[3]See, art. 93 of the UN Charter; art. 36 (1) of Vienna Convention on Consular Relations; art. 73 and art. 74 of Rules of Court Procedures ICJ, 1978; art. I of Optional Protocol to Vienna Convention.

diplomatically isolating Pakistan on the point of its linkages to terrorism. The experts of international relations-diplomacy have opined that India need not undertake hastily any negotiations unless availing other lawful recourses. Thus, decision of Indian government resorting to procedure of ICJ proved favourable till date. Still the recourse of approaching UN General Assembly to create International pressure on Pakistan is open for India.

The case of Kulbhushan is not only unique for India but it is unique for International Law as well, reason being that this case questions the effective implementation and binding nature of International Law. Nevertheless jurisdiction of ICJ and its interim order to stay execution of Kulbhushan till the final judgment stands high on the foundation of judicial precedents[4] and provisions of International Law.

The prospective consequences of this case are: it will highlight declining democracy in Pakistan, opaqueness of legal procedures conducted by Martial Court of Pakistan in absence of strong evidence, violation of International Law and human rights and lack of shared trust between two countries. There are still many unanswered questions like, why Pakistan is not revealing evidences to substantiate and prove its allegations? Whether mere facts (corroborated), narration of story and doubtful confession be held valid to award highest punishment-capital sentence? Whether trying civilian in secret trial by martial court is in line with due process? What should be the underlying principle of criminal law dealing with spying and espionage? What are the far reaching consequences of this case on bilateral relations? How India is going to frame its prospective legal policy on such matters? Whether International Law will be efficacious to resolve case on merit and implement its decision?

The author appeals to the Pakistani scholars and leaders to mind that conviction without conclusive proof and on the basis of mere doubtful/forced confession will undermine rule of law. Moreover, arbitrary execution of Kulbhushan will mark the collapse of justice oriented democracy in Pakistan. Also, they should understand basic difference between spying as a 'peace time' and terrorism as 'a war time' crime. Even if Pakistan considers Kulbhushan a spy, the treatment given to him like terrorist amounts to gross subversion of established international norms and violation of Kulbhushan's human rights. Pakistan must defer from such deliberate unlawful moves and considering that it stands among top countries[5] in execution across the world, it must note that, "The death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment".[6]

Moreover, it is an opportunity for the World Court to ensure effective implementation of International Law and uphold sacred human rights and state's legal rights. Tracing the Kashmir Singh case of 1970s, the Indian accused of spying who was pardoned and released after long battle of 35 years; the author is hopeful that sooner or later, Kulbhushan may be released provided the due process is followed by both the sides. No doubt, the crucial debates triggered by this case will pave way for upcoming legal policies on alike sensitive issues.

[4] *James* v. *Trinidad and Tobago,* 2000; *LaGrand Case (Germany* v. *United States of America),* ICJ, 2001; *Mexico* v. *United States* (ICJ), 2004.
[5] Amnesty International Report on Execution of Death Penalty, 2015.
[6] *Glossip et. al.* v. *Gross et al.*, Breyer J., 576 U. S. (2015).

NATIONAL GREEN TRIBUNAL AND THE ART OF LIVING CASE: A CASE OF MISSED OPPORTUNITY

*Amrithnath SB**

Environment protection became a focal point in the early seventies at the international level and since then, there is an increased the awareness among the international community. The need to protect environment started from the Stockholm Declaration in 1973, with specific recognition of climate change in United Nations Framework Convention on Climate Change (UNFCCC), 1992 to the 2017 Conference of the Parties (COP 23) in Bonn, Germany. As an outcome of these deliberations, several concepts got infused into the broader spectrum of international environmental law. These concepts have permeated into domestic laws around the world and are now being applied by the courts in finding resolutions to issues relating to environmental degradation.

In India, the National Green Tribunal Act, 2010 established the National Green Tribunal (NGT) with an objective to exclusively consider cases related to certain legislations which regulate environment and its management. It is the only law in India which specifically recognises the concepts of sustainable development, precautionary principle and polluter pays principle.[1] This paper analyses a recent order of the NGT in applying the polluter pays principle.

NGT's recent decision[2] with respect to pollution of Yamuna flood plains by the Art of Living Foundation is considered to be a controversial case where the Tribunal applied absolute liability principle and polluter pays principle in making the foundation responsible for the pollution.

The Art of Living (AOL) Foundation conducted the World Cultural Festival from March 11-13, 2016 on the banks of the river Yamuna. Before the festival, an environmentalist, Mr. Manoj Mishra, had approached the NGT and sought stoppage of the ongoing construction for the event in Yamuna flood plains citing irreversible environmental degradation. The NGT allowed the conduct of the festival citing *fait accompli* even after an inspection by an appointed expert who also reported massive damage to the plains. Initially, the Tribunal imposed a fine of Rs. 5 crores on the AOL Foundation. However, an NGT appointed expert panel recommended a fine of Rs. 42 crores for the physical and biological rehabilitation of the flood plains. But the Tribunal in its final decision held the AOL foundation responsible for the damage caused and directed the already paid fine of Rs. 5 crores to be utilised for restoration activities by the Delhi Development Authority (DDA). It also held the DDA responsible for failing to do its statutory duties.

The liability on AOL Foundation was based upon absolute liability principle and polluter pays principle. But the question is on the interpretation of the polluter pays principle.

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[1]S. 20 of the National Green Tribunal Act, 2010, Tribunal to apply certain principles: - The Tribunal shall, while passing any order or decision or award, apply the principles of sustainable development, the precautionary principle and the polluter pays principle.

[2]*Manoj Mishra* v. *DDA*, Original Application no. 65 of 2016, (M.A. No. 130 of 2016) dated 7th December 2017.

This decision is potentially damaging since such a mechanical application of the principle will set a bad precedent. It clearly gives an impression that as long as you can pay, you can pollute. Such an interpretation is widely discredited and the Supreme Court has also categorically rejected such an argument. In *Research Foundation for Science* v. *Union of India*,[3] the Supreme Court has clearly explained that "the polluter pays principle basically means that the producer of goods or other items should be responsible for the cost of preventing or dealing with any pollution that the process causes… The principle also does not mean that the polluter can pollute and pay for it."

The polluter pays principle has been explicitly used by the Supreme Court in various cases for making polluters liable for the pollution already caused.[4] But in this case, the NGT was approached even before the conduct of this festival and it was the Tribunal which granted the permission to go forward with the festival after paying up. Such an approach seems to give a prospect for all those who want to degrade the environment for their own purposes and settle it by compensation. The same case could have also been made to be a deterrent example for those who wanted to pollute if the NGT had given an exorbitant amount as compensation. Even the expert panel appointed by the NGT had suggested more amount to be charged as fine, but the Tribunal missed an opportunity for negative interpretation of polluter pays principle, which would have brought a positive outcome in the long run.

[3](2005) 13 SCC 186.

[4]*MC Mehta* v. *Kamal Nath*, 1997 (1) SCC 388, *Vellore Citizens' Welfare Forum* v. *Union of India*, AIR 1996 SC 2715;*Indian Council for Enviro- Legal Action* v. *Union of India*, J.T. 1996 (2) 196.

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